


*This Book
Does Not
CIRCULATE*



Digitized by the Internet Archive
in 2011 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

Abstract



348 I.A. 68

Gen. No. 10605.

Agenda No. 19.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
MAY TERM, A. D. 1952.

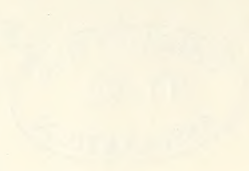
LOLA M. AVRAM,)	
Plaintiff-Appellee,)	
)	
vs.)	
)	
FLETCHER HAMMOND, AURORA CITY	)	Appeal from the
LINES, INC., an Illinois	)	Circuit Court of
Corporation, WILLIAM R. WOODS	)	Kane County, Illinois.
and FRED O. LEONARD,)	
Defendants-Appellants.)	

WOLFE,-- J.

This is a suit for personal injuries started by Lola M. Avram against Fletcher Hammond, Aurora City Lines, Inc., and William R. Woods and Fred O. Leonard. The suit was started in the Circuit Court of Kane County, Illinois. It resulted in a judgment for \$10,000.00 in favor of the plaintiff against all four of the defendants. To reverse this judgment an appeal has been perfected to this Court.

Broadway street runs north and south and New York street runs east and west, in the City of Aurora, Illinois. Broadway is sixty feet wide and New York Street is forty-five feet wide. The plaintiff, Lola M. Avram, was a passenger for hire on a bus of the Aurora City Lines, and William O. Woods was the driver of a truck owned by Fred O. Leonard. The bus

BOUND.....JUN 24 1969.....



and truck collided at the intersection of these two streets and the plaintiff was injured. It is claimed by the plaintiff that it was through the negligence of the drivers of both the truck and bus that she was injured. At the time of the collision the street was icy. There are stop and go signs at the intersection, and it is claimed that the bus driver started the bus to go through the intersection before the green, or go sign, appeared. It is also claimed that the truck was heavily loaded with cattle, and the driver was negligent in driving into the intersection, and his negligence, coupled with the negligence of the driver of the bus, was the cause of the injury to the plaintiff.

It is argued in the brief of the appellants filed by Hammond and Woods that it was the negligence of the driver of the bus that caused the injury, and that their driver was not guilty of any negligence. It is argued by the appellants, Aurora City Lines and Fred O. Leonard, that they were not guilty of any negligence, and it is wholly the negligence of the driver of the truck which caused the injury. All of the appellants filed a joint brief. Who was at fault in causing the injury to the plaintiff, was a question of fact that was submitted to the jury for their consideration. They have found that the drivers of both the truck and of the bus were guilty of negligence which was the proximate cause of the injury to the plaintiff. From a review of the evidence as abstracted, it is our conclusion that the finding of the jury is sustained by the evidence.

It is insisted by the appellants that the trial

3.

court committed reversible error in permitting plaintiff to demonstrate in the presence of the jury, her physical disability while wearing a surgical garment. Such demonstrations are within the sound discretion of the trial court, and unless this Court can see that there was an abuse of such discretion, we would not be justified in reversing the case. This demonstration, if any, would not effect the controversy as to whether the plaintiff was injured and whose negligence had caused such injury. It would only show the extent of her injuries which she sustained because of the accident. The Court did not abuse his discretion in allowing the demonstration in question.

At the request of the plaintiff the Court gave the following instruction: "It was the duty of the defendant, Aurora City Lines, Inc., an Illinois Corporation, as a common carrier of passengers, to use the highest degree of care in the safety of its passengers, consistent with the practical operation of its bus and the mode of conveyance used." It is insisted by the appellants that the Court erred in giving this instruction because it is "abstract, peremptory, prejudicial, misleading and tends to minimize the non-insured rule." They have cited several cases which have criticized some instructions as being abstract proposition of law, and usually the Courts do not favor such instructions. While it is an abstract instruction, we have found no case which challenges this instruction as being the law applicable to such cases. The instruction need not negative the fact that the bus company was not an insurer of its passengers. We do not think the jury could be prejudiced by giving this instruction.

4.

Before the case went to trial the defendants filed a motion to have the Court order that plaintiff's X-rays be submitted to them for pre-trial discovery. The Court refused this motion and it is now insisted that the defendants were prejudiced by not having the X-rays for their experts to examine before the trial. We do not think that the Court erred in refusing this request, but if there was any error the appellants are not now in a position to raise it, as the X-rays in question were introduced in evidence without objection, and with the express permission of the defendants.

The jury assessed the plaintiff's damages at \$10,000.00 and the Court entered judgment for that amount. The medical bill for the plaintiff was only \$264.00 and since that time the plaintiff has carried on her work as a school teacher, and so far as the record shows her earning capacity is the same now as it was before her injury. The evidence does show that she has suffered and does not carry on her work with as much ease as she did before the accident. We are of the opinion that \$10,000.00 damages is excessive.

It is therefore ordered that the case be remanded to the Circuit Court of Kane County, Illinois, and if the plaintiff shall file a remittitur of \$2,500.00 within thirty days from the date of such remandment then a judgment for \$7,500.00 shall be approved; if a remittitur of \$2,500.00 is not filed in such time, then the judgment shall be reversed and a new trial granted.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 23rd day of April, in the year of our Lord one thousand nine hundred and sixty-nine.

John E. Hall
Clerk of the Appellate Court.

ABST.



3481. A. 122.

45686

MARION STEDMAN HISKEY and
EUNICE STEDMAN CROMWELL,
Appellees,

v.

JOHN L. FREY, Executor of
the last will and testament
of WALTER H. STEDMAN, deceased,
Appellee,

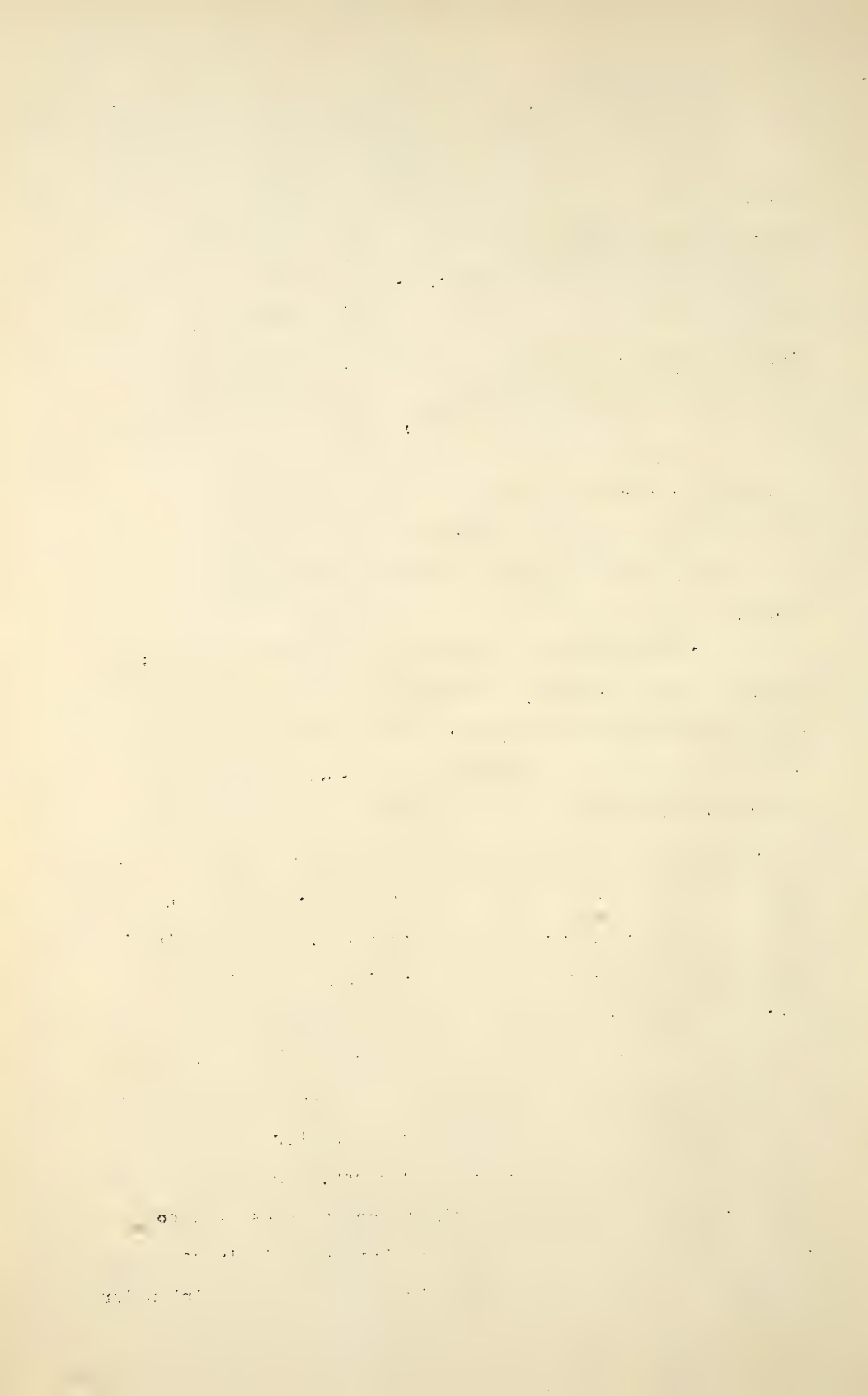
and

FOREST HOME CEMETERY COMPANY
OF CHICAGO,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE
COURT.

Plaintiffs sue for construction of the will of their uncle Walter H. Stedman. The trial court heard the evidence and arguments and found that the dispositive portions of the will were too vague, indefinite and ambiguous to ascertain decedent's intention, and decreed that the property be distributed in equal parts to plaintiffs as the only heirs-at-law. Defendant Forest Home Cemetery Company of Chicago appealed. No transcript of the evidence is preserved in the record submitted to this court. Appellant asks that we review the case without that transcript. It is difficult to see how we can do this. The will is obviously vague and ambiguous, and evidence offered and received of circumstances under which the will was made, and other pertinent evidence should have been preserved for this court. However, we have considered the matter on the record as presented to us and have come to the conclusion that the will is so ambiguous and vague on its face that the testator's intention



with respect to the distribution of his property cannot be determined.

The will, a holographic document written on testator's office stationery, is short, and we quote it in full:

"Chicago, July 11, 1948

Last Will and Testament of Walter H. Stedman being of sound mind hereby appoint John L. Frey of Island Lake, McHenry, Illinois my sole executor without bond.

1st. Pay all funeral expenses, not to exceed \$800.00 to C. W. Haggard of 124 Madison Street, Oak Park.

2nd. Shall dispose of all real and personal property.

3rd. Power to collect any and all sums due and payable to me including insurance in American Standard Life Insurance Company of face value \$1000 and KOTM policy of \$3000.

4th. Bond of 500 in Columbus Memorial Building, Box 3457 and abstract for 641 N. Lockwood Ave.

5th. Silverware at above residence located in attic and jewelry in box on top of old bookcase in unused northeast bedroom.

6th. Balance left shall be given to Forest Home Cemetery of Forest Park for Special care for five (5) graves in South 1/2 Lot 62 (Drum) lot and (4) graves in South 1/2 Lot 101 Section 26 (Stedman) lot.

7th. Date of (year) my demise to be cut on headstone by Kistenbrocker of Forest Park, Illinois.

8th. Name of Frank B. - 1870 - ? on Stedman monument South 1/2 101 Section 26 to be cut also by Kistenbrocker.

9th. Any and all dispositions not mentioned herein shall be at the discretion of my executor.

In Witness Hereof I set my hand and seal this 11 day of July, 1948.

(Sgd) Walter H. Stedman (Seal)

Fred Robert Rose, Witness
Marie C. Rose, Witness
645 N. Lockwood."

(Italics added.)

The total estate amounts to \$16,500. The disputed clauses around which this litigation centers are the second, sixth and ninth. By the second clause, the executor is directed to "dispose of all real and personal property." Without any further intermediate bequests or dispositions, decedent, by the sixth clause, provides that the balance shall be given to appellant for the special care of five graves. Then, after two clauses providing for headstone inscriptions, he again states, in the ninth clause, that "any and all dispositions not mentioned herein shall be at the discretion of my executor."

It is appellant's contention that Clause 6th is a residuary provision, whereby the residue, about \$16,000, after payment of funeral expenses and the incidental expenses mentioned in Clauses 7th and 8th, should go to appellant for the special care of five graves. While it is true, as appellant contends, that the word "balance" has in a number of cases been construed synonymously with "residue," those cases are not applicable to this will. Clause 2nd provides for disposition by the executor of all real and personal property. It is uncertain what the testator meant by this--whether he meant the reduction to cash of real and personal property or whether he intended to give the executor general power to make certain distributions before implementing Clause 6th. The latter construction is fortified by the language of the last paragraph, providing that any and all dispositions shall be at the discretion of the executor.

The estate is in liquid condition and as appears from the will itself, a substantial portion thereof consists of insurance and a bond. There was no occasion thus to provide for reducing the estate to cash. Certainly, the testator must have meant something more by Clause 2nd than merely to reduce to cash the real and personal property. When we consider that without any intervening bequests or legacies, decedent provides for the "balance" to be given to the Forest Home Cemetery Company for the special care of graves, further doubt is cast upon the meaning of the disposition intended in the second paragraph. If it were merely intended to provide for a reduction to cash, there would be no point in referring to the "balance" in Clause 6th. If disposition were left entirely to the executor, this would, of course, be an invalid provision. The will is further befogged by the provision of Clause 9th that "Any and all dispositions not mentioned herein shall be at the discretion of my executor." If, as contended by appellant, the word "balance" as used in Paragraph 6th gave it the entire residue, there was nothing left upon which Paragraph 9th could operate.

Plaintiffs argue that although the word "care" is defined in the Illinois Revised Statutes, 1951, Ch. 21, Par. 64.2, the words "special care" are not so defined and add further to the vagueness and ambiguity of the will. They contend with force that it is incredible that decedent intended to leave the balance of the estate, amounting to

approximately \$16,000 after payment of funeral and administration expenses, to a cemetery corporation organized for profit with which he could have contracted for the same service for less money.

We feel that the conclusion of the chancellor was sound. In so holding, we have given consideration to the various rules of will construction argued for by appellant--that a will should be construed as a whole, that intestacy should be avoided, and other sound principles. We have not undertaken to distinguish the cases cited by appellant. We have examined them, but do not think they support appellant's position. As this court said in Continental Illinois National Bank & Trust Co. etc. v. Art Institute of Chicago et al., 341 Ill. App. 624:

"Comfort can always be found in the general language used by courts in the multitude of opinions written in will cases. Cases involving the construction of wills do not have the controlling force of precedents as in other cases. Cahill v. Michael, supra, p. 400. It is recognized that wills are found in a great variety of forms and executed under circumstances peculiar to each individual case, Walker v. Walker, 283 Ill. 11; Smith v. Gerber, 286 Ill. 67."

Although absolute certainty is not required, a will must be sufficiently clear so that a court does not have to indulge in conjectures as to the supposed intention of a testator. Jordan v. Jordan, 281 Ill. 421. In our opinion the dispositive provisions of this will do not possess sufficient certainty for the court to be able to determine the testator's intent. The decree is affirmed.

Decree affirmed.

Robson, P. J., and Tucky, J., concur.



45714

JOHN T. WAKEFIELD,

Appellee,

v.

MALL TOOL COMPANY,
a corporation,

Appellant.

)
) APPEAL FROM MUNICIPAL
) COURT OF CHICAGO.
)
)

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE
COURT.

Plaintiff sued defendant in the Municipal Court of Chicago for a total of \$461.32 made up of the following items: \$155.66 wages for overtime work, \$155.66 liquidated damages and \$150.00 for attorney's fees, the last two items being claimed under provisions of the Fair Labor Standards Act of 1938 providing such damages and fees in the case of unwarranted failure to pay overtime wages. The case was tried by a court without a jury and judgment entered on a finding for the full amount claimed in favor of plaintiff. Defendant appeals.

The defense to the action was based upon the contention that plaintiff, who was employed as a watchman in defendant's plant, was not engaged in interstate commerce and that the Fair Labor Standards Act of 1938 applies only to employees so engaged.

There is testimony tending to prove that plaintiff's duties required him to perform certain services in a warehouse where equipment manufactured by defendant was shipped into interstate commerce. From our review of the evidence we think it reasonably tended to raise a question of fact

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

2. The second part of the paper is devoted to a detailed study of the case of the system of equations

3. The third part of the paper is devoted to a study of the case of the system of equations

4. The fourth part of the paper is devoted to a study of the case of the system of equations

5. The fifth part of the paper is devoted to a study of the case of the system of equations

6. The sixth part of the paper is devoted to a study of the case of the system of equations

7. The seventh part of the paper is devoted to a study of the case of the system of equations

8. The eighth part of the paper is devoted to a study of the case of the system of equations

9. The ninth part of the paper is devoted to a study of the case of the system of equations

10. The tenth part of the paper is devoted to a study of the case of the system of equations

11. The eleventh part of the paper is devoted to a study of the case of the system of equations

12. The twelfth part of the paper is devoted to a study of the case of the system of equations

13. The thirteenth part of the paper is devoted to a study of the case of the system of equations

14. The fourteenth part of the paper is devoted to a study of the case of the system of equations

15. The fifteenth part of the paper is devoted to a study of the case of the system of equations

16. The sixteenth part of the paper is devoted to a study of the case of the system of equations

17. The seventeenth part of the paper is devoted to a study of the case of the system of equations

18. The eighteenth part of the paper is devoted to a study of the case of the system of equations

19. The nineteenth part of the paper is devoted to a study of the case of the system of equations

20. The twentieth part of the paper is devoted to a study of the case of the system of equations

21. The twenty-first part of the paper is devoted to a study of the case of the system of equations

22. The twenty-second part of the paper is devoted to a study of the case of the system of equations

-2-

as to whether plaintiff was engaged in interstate commerce and accordingly we would not be justified in interfering with this finding of the trial court. The judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.



3481.A.123

2.

45740

APEX MOTOR FUEL COMPANY, a
corporation,

Appellant,

v.

ADOLPH STIGLITZ and WHOLESale
OIL AND PETROLEUM COMPANY, a
corporation,

Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendants to recover the balance due on certain notes executed by defendants and for labor and material furnished to them by plaintiff. Defendants answered denying liability on some items claimed by plaintiff and filed a counterclaim alleging that there was due them from plaintiff certain commissions on the sale of gasoline and credits for equipment. A trial by the court without a jury resulted in a finding that there was due on plaintiff's claim \$5,923.80, and that there was due defendants on their counterclaim \$6,170.00. Judgments were entered accordingly. Plaintiff appeals.

For more than a decade defendants sold plaintiff's gasoline, motor oil and other petroleum products on a commission basis. When the business relations between the parties began in 1937, defendant Adolph Stiglitz was doing business as Wholesale Oil Company. Afterwards he formed the Wholesale Oil and Petroleum Company, a corporation. Stiglitz is president of the corporation. From time to time plaintiff made loans and extended credit to Stiglitz

and the corporation. In 1942 defendants were indebted to plaintiff in excess of fourteen thousand dollars. This indebtedness was secured by notes executed by defendants. At the time of the trial the balance due on these notes, exclusive of interest, was \$1,300.

In September 1946 Stiglitz demanded an increase of 1/2 cent a gallon in commission on the sale of gasoline known as Sky Chief. After some negotiations plaintiff granted an increase of 1/4 cent a gallon and thereafter defendants received a total commission on the sale of Sky Chief gasoline amounting to 1-1/4 cents a gallon.

July 1, 1947 defendants executed an agreement prepared by plaintiff and written on its letterhead, which reads:

Following our discussion with Mr. Stiglitz, it was mutually agreed that he is to sign a note in the amount of \$2,403.10, which is the purchase price for the loaned equipment at his various accounts. The note is to bear no interest and is to be paid off on the same basis and under the same conditions and guarantees as are applicable to the existing agreement and supplemental agreements dated February 14, 1942.

It was further agreed that should anyone of the stations change from Apex to some other supplier, the equipment at such location is to be paid at once.

It was further agreed that the entire expense of service to the equipment was to be defrayed by the Wholesale Oil Company, and we have the authority of Mr. Adolph Stiglitz to handle his service work to the best of our ability and charge the Wholesale Oil Company. If any major expenses are involved we are to get in touch with Mr. Stiglitz before proceeding with any work. Service charges are to be paid monthly.

In consideration of the above the Wholesale Oil Company is to receive an additional one-fourth cent ($1/4\%$) per gallon commission on premium grade (Sky Chief) gasoline only.

Wholesale Oil Co.
Adolph Stiglitz

W. Bauer

The note for \$2,403.10 referred to in the foregoing agreement was executed by Stiglitz in payment of certain equipment owned by plaintiff and used by other persons operating gasoline filling stations who purchased gasoline and petroleum products from defendants. After defendants purchased the equipment plaintiff charged defendants for all services on this equipment as provided in the written agreement.

It is undisputed that at the time the written agreement was executed on July 1, 1947 defendants were receiving a commission on the sale of Sky Chief gasoline of $1-1/4$ cents a gallon. In construing this agreement the trial court found that the additional commission of one quarter cent a gallon provided for in the concluding paragraph was intended as an extra commission thus increasing defendants' total commission on the sale of Sky Chief gasoline to $1-1/2$ cents a gallon commencing July 1, 1947.

Plaintiff says that the agreement made July 1, 1947 was merely a confirmation of the oral agreement made by the parties in September 1946. At the trial plaintiff attempted to show all the circumstances surrounding the agreements between the parties relative to the payment of commissions. When Stiglitz was asked by plaintiff's counsel

whether the purpose of the written agreement was "to put into writing" the oral agreement of 1946 the trial court sustained defendants' objection on the ground that it would vary the terms of the written agreement. Plaintiff contends that the court erred in restricting plaintiff's testimony.

The verbs and verb-phrases used in the written agreement are in the future tense and contemplate events that are to come. In the first paragraph of the written agreement appears the verb-phrase "is to sign" a note; the note "is to bear" no interest, and "is to be paid off." In the second paragraph appears "is to be paid at once." In the third paragraph we find the words "are to be paid" monthly and in the last paragraph the language used is "is to receive" an additional one-fourth cent. We think all of these expressions indicate simple futurity. See Webster's New International Dictionary, 2nd ed., 1949, p. 2657, par. 15, subpar. b. It is to be noted that no reference is made in the written agreement to the former oral agreement. In our view plaintiff's questions were objectionable because they were designed to give the written agreement a retro-active effect.

Plaintiff argues that further testimony was necessary to explain certain alleged ambiguities in the agreement such as the phrase "loaned equipment at his various accounts" appearing in the first paragraph, and the words "service work" and "major expense" appearing in the last paragraph. No issue was raised as to the loaned equipment.

Plaintiff's evidence tends to show that the terms "service work" and "major expense" were well understood in the trade. Plaintiff also insists that since the agreement does not state the rate of commission defendants were receiving on the sale of Sky Chief gasoline before July 1, 1947 the trial court could not determine "without additional testimony as to what was the commission to which the 1/4 cent a gallon was to be added." The record shows that the trial court permitted introduction of testimony for the purpose of showing the rate of commission paid defendants before the written agreement was executed. So far as the record shows there was no controversy as to the rate of commission before the agreement was executed, and we must presume that plaintiffs knew how much commission they were paying defendants and, by the same token, defendants knew how much they were receiving. Therefore the absence of a provision in the written agreement showing the rate of commission in effect before the execution of the contract could not create any uncertainty in the minds of the parties.

When a contract is reduced to writing it is conclusively presumed that the written instrument expresses the entire contract between the parties, and all prior and contemporaneous negotiations in respect to the subject-matter of the contract are excluded. (Reilly Tar and Chemical Corp. v. Lewis, 301 Ill. App. 459.)

Plaintiff insists that there was an accord and satisfaction. Stiglitz testified that he had conversations with the president of the plaintiff between July 1947 and

December 1948 in reference to commissions on motor oils and greases; that he demanded the additional quarter of a cent commission on the sale of Sky Chief gasoline and threatened to sever his business relations with the plaintiff unless he received it. Although Stiglitz received monthly checks for commissions and cashed them his testimony tends to show that there was no understanding that the receipt and cashing of these checks constituted a satisfaction of his claim against the plaintiff. Our courts of review have repeatedly held that to constitute an accord and satisfaction there must be an honest dispute between the parties, a tender with the explicit understanding of both parties that it was in full payment of all demands, and an acceptance by the creditor with the understanding that the tender is accepted in full payment. (Charles P. Hennecke v. Harold Warp and Plexoglass, Inc., an Illinois corporation, 347 Ill. App. 425, Plaintiffs evidence fails to meet this test.

In their reply brief defendants suggest that plaintiff's judgment should be corrected by being reduced to \$4,583.34. Plaintiff does not complain of the judgment entered in its favor on its statement of claim, nor has a crossappeal been filed by defendants. In this state of the record only the judgment entered on the defendants' counter-claim is before us. In our opinion the construction given the agreement dated July 1, 1947 by the court is consistent with the statements and admissions made by the parties. We think there is ample evidence to support the finding in

[illegible]

favor of the defendants on their counterclaim in the sum of \$6,170. The amount really in controversy between the parties as the case stands in this court is the difference between the judgments entered in the trial court, amounting to \$246.20. Judgment therefore should have been entered in favor of the defendants on their counterclaim for the amount in excess of the sum found due plaintiff on its claim.

For the reasons assigned the judgments are, reversed, and judgment is entered here in favor of the defendants on their counterclaim and against the plaintiff, in the sum of \$246.20.

JUDGMENTS REVERSED AND JUDGMENT
ENTERED HERE IN FAVOR OF THE
DEFENDANTS AND AGAINST THE
PLAINTIFF.

FEINBERG AND KILEY, JJ., CONCUR.

45656

SAM OLSON,

v.

ZARCO INDUSTRIES, INC., a
corporation,



Appellee,

Appellant.

348 I.A. 124

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a decree of foreclosure of a mechanic's lien. The complaint alleged a contract to do certain cement work on the premises owned by defendant for the sum of \$2275. After the work was completed plaintiff called the president of the defendant company and asked for payment of the amount due. Plaintiff's version of this conversation was that the president told him if he would send his bill and waiver of lien, he would pay his bill in full. Defendant's version was that the promise was to send some money but not payment in full. There is a dispute in the evidence as to whether defendant complained when the work was completed.

Following the telephone conversation referred to, plaintiff sent his invoice for \$2275 together with waiver of lien executed by him. The waiver of lien, under seal, recited that in consideration of \$2290 and other good and valuable considerations, he waived and released any and all claim or right of lien on said above described building and premises under the statute relating to mechanic's liens, on account of labor and materials, or both, furnished or to be furnished.

Defendant's answer alleged defective construction and waiver of lien as a bar to the action.

The cause was referred to a master, who heard the evidence and recommended a decree in favor of plaintiff, finding that there was substantial compliance with the contract and that the waiver of lien was not a bar to the action. The decree confirmed the master's report.

We think the evidence amply sustains the master's finding of substantial compliance with the contract. In our opinion the waiver of lien is not a bar to the action for the following reasons: It was given after the work was completed and was induced by the promise to pay plaintiff's invoice in full, and there was definitely a failure of consideration. The consideration recited was \$2290. It is undisputed that defendant paid only \$1500. In this respect the instant case differs factually from Wolff Co. v. Gwynne, 246 Ill. App. 86, relied upon by defendant. There, the waiver of lien was under seal, and the claim was want of consideration not failure of consideration, as in the instant case. It was there held that the seal imported consideration and therefore the claim of no consideration could not be sustained.

We think the decree was correct, and it is affirmed.

AFFIRMED.

LEWE, P. J., AND KILEY, J., CONCUR.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

348 I.A. 130

May Term, A. D., 1952

Term No. 52-M-3.

Agenda No. 2

JAMES DAWSON,)	
Plaintiff-Appellant,)	
)	
-v-	)	Appeal from the
	)	Circuit Court,
	)	Franklin County.
MARYLAND CASUALTY COMPANY,)	
a Corporation,)	
Defendant-Appellee.)	

The Honorable Caswell J. Crebs, Judge Presiding.

- - - - -

BARDENS, P.J.

Plaintiff, on May 21, 1948, was a police officer of the City of West Frankfort, Illinois, and on that date sustained an accidental injury arising out of and in the course of his employment. He thereafter filed a claim before the Industrial Commission and that litigation was prosecuted to the Supreme Court which held that at the time of his injury he was an officer of the city and not an employee as that term is used and defined in section five of the Workmen's Compensation Act; Ill. Rev. Stat., 1947, Chapter 48, Paragraph 142. See City of West Frankfort vs. Industrial Commission, 406 Ill. 452.

Thereafter plaintiff filed this suit against the Maryland Casualty Company, a corporation, for the sum of \$3,677.14, alleging that that was the total amount of benefits he would have been entitled to under the Compensation Act had he been under that

act. His theory of recovery in this case is upon the basis that he is a third party beneficiary of the insurance contract entered into between defendant and the City of West Frankfort (hereinafter referred to as city). The pertinent parts of the policy in question are as follows:

Standard Workmen's Compensation and
Employers' Liability Policy.

MARYLAND CASUALTY COMPANY
Baltimore
A Stock Company

Does Hereby Agree with this Employer, named and described as such in the Declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom as follows:

Compensation.

1. (a) To Pay Promptly to any person entitled thereto under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due.

(1) To such person because of the obligation for compensation for any such injury imposed upon or accepted by this Employer under such of certain statutes, as may be applicable thereto, cited and described in an endorsement attached to this Policy, each of which statutes is herein referred to as the Workmen's Compensation Law, and,

(2) For the benefit of such person the proper cost of whatever medical, surgical, nurse or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, whatever funeral expenses are required by the provisions of such Workmen's Compensation Law.

It is agreed that all of the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation or other benefits for any personal injury or death covered by this

Policy, while this Policy shall remain in force. Nothing herein contained shall operate to so extend this Policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited in an endorsement hereto attached.

Liability.

I. (b) To Indemnify this Employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada.

Employees Covered.

V. This agreement shall apply to such injuries sustained by any person or persons employed by this Employer whose entire remuneration shall be included in the total actual remuneration for which provision is hereinafter made, upon which remuneration the premium for this Policy is to be computed and adjusted, and, also to such injuries so sustained by the President, any Vice-President, Secretary or Treasurer of this Employer, if a corporation. The remuneration of any such designated officer shall not be subjected to a premium charge unless he is actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman.

This Agreement Is Subject to the Following Conditions:

Basis of Premium.

Condition A. The premium is based upon the entire remuneration earned, during the Policy Period, by all employees of this Employer engaged in the business operations described in said Declarations together with all operations necessary, incident or appurtenant thereto, or connected therewith whether conducted at such work places or elsewhere in connection therewith or in relation thereto; excepting however the remuneration of the President, any Vice-President, Secretary, or Treasurer of this Employer, if a corporation, but including the remuneration of any one or more of such designated officers who are actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman. If any operations as above defined are undertaken by this Employer but are not described or rated in said

Declarations, this Employer agrees to pay the premium thereon, at the time of the final adjustment of the premium in accordance with Condition C hereof, at the rates, and in compliance with the rules, of the Manual of Rates in use by the Company upon the date of issue of this Policy. At the end of the Policy Period the actual amount of the remuneration earned by employees during such period shall be exhibited to the Company, as provided in Condition C hereof, and the earned premium adjusted in accordance therewith at the rates and under the conditions herein specified. If the earned premium, thus computed, is greater than the advance premium paid, this Employer shall immediately pay the additional amount to the Company, if less, the Company shall return to this Employer the unearned portion, but in any event the Company shall retain the Minimum Premium stated in said Declarations. All premiums provided by this Policy, or by any endorsement hereon, shall be fully earned whether any such Workmen's Compensation Law, or any part of such, is now or shall hereafter be declared invalid or unconstitutional.

Plaintiff also attached and made a part of his amended complaint the renewal certificate covering the period in question, the pertinent parts of which are as follows:

Renewal Certificate.

Certificate No. 08-064131.

Renewing Policy No. 01-332403.

In consideration of the payment of the premium, it is agreed that the policy designated above is renewed for the policy period stated below, subject to all its terms except as otherwise specified herein.

Name of Employer: City of West Frankfort & City of West Frankfort Water Department.

P. O. Address: West Frankfort, Illinois.

Policy Period: From October 1, 1947, to October 1, 1948, 12:01 A. M.

Location of all work places: State of Illinois.

All Operations at or From Such Work Places -- Classified by Code	Estimated Total Remuner- ation	Rate Per \$100 of Remuner- ation	Estimated Premium
---	---	---	----------------------

Waterworks Operations, etc.	#7520	5640.00	1.965	110.83
---	-------	---------	-------	--------

Street or Road Con- struction, etc.	#5506	880.00	3.420	30.10
--	-------	--------	-------	-------

Policemen, etc.	#7720	4800.00	2.295	110.16
----------------------------	-------	---------	-------	--------

Firemen, etc.	#7704	3600.00	2.130	76.68
-----------------------	-------	---------	-------	-------

		Loss Constant		10.00
--	--	---------------	--	-------

		Expense Constant		10.00
--	--	------------------	--	-------

Audit Basis	Deposit Premium	Minimum Premium 54.00 65.00 Per Fire Co. \$ O.D. Nil	Estimated Advance Premium \$347.77
Annual	\$		

Approved by

Checked by

Standard Ins. Agency #8200.

Broker or
Sub-Agent

Branch Office or
General Agent

Plaintiff's amended complaint, after alleging his employment and the accident resulting in his injury, alleged in paragraph six that premiums on the policy were fully paid on the salary and earnings of all police officers, including the plaintiff, for the policy year in question and that the defendant com-

pany accepted and retained such premiums for that year.

To Plaintiff's amended complaint the defendant filed a motion to dismiss based on the Supreme Court decision above referred to and asserting in effect that because of that decision plaintiff was not entitled to recover under this policy. The lower court heard arguments on the motion, allowed it and dismissed the cause. Plaintiff elected to stand upon his amended complaint and thereupon judgment was entered in favor of the defendant and against the plaintiff for costs.

Plaintiff now contends that regardless of whether or not he was an employee under the Compensation Act he nevertheless was included within the terms and conditions of the policy in question and therefore is entitled to recover from the defendant the amount that he would have been allowed under the Compensation Act if he had been an employee under that act. He relies mainly upon paragraph V of the policy, together with the fact that his remuneration was included in fixing the premium paid by the city as shown by the renewal certificate. On the other hand the defendant contends that since the policy is a Workmen's Compensation and Employer's Liability Policy and since it has been decided that plaintiff is not an employee under the Compensation Act, he therefore is not included within the terms of the policy.

While the Workmen's Compensation Act is made a part of the policy and the Act is material to

1. The first part of the paper discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the success of any business or organization. The author provides a detailed overview of the various methods used to collect and analyze data, highlighting the strengths and weaknesses of each approach. The discussion is supported by numerous examples and case studies, which illustrate the practical application of these techniques in real-world scenarios. The author also addresses common challenges and offers solutions to overcome them, ensuring that the reader has a comprehensive understanding of the subject matter.

2. The second part of the paper focuses on the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the success of any business or organization. The author provides a detailed overview of the various methods used to collect and analyze data, highlighting the strengths and weaknesses of each approach. The discussion is supported by numerous examples and case studies, which illustrate the practical application of these techniques in real-world scenarios. The author also addresses common challenges and offers solutions to overcome them, ensuring that the reader has a comprehensive understanding of the subject matter.

a proper construction of it, nothing in the policy excludes its extension of benefits to others than employees under the Act. Nor is there any reason why the company and city could not provide for others than employees under the act.

There can scarcely be any doubt upon a reading of the provisions of the policy that it did, by its paragraph V and by the use of plaintiff's salary as a basis for a premium, specifically include plaintiff as a third party beneficiary under its terms. Defendant's insistence that plaintiff is not under the terms of the policy because paragraph 1A limits recovery to those cases which are under the Workmen's Compensation Law fails to take into consideration paragraph V and the admitted fact that the defendant charged premiums and the city paid those premiums based upon plaintiff's salary as a police officer. Carson Pirie Scott & Co. vs. Parrett, 346 Ill. 252; 12 Am. Jur., Contracts, par. 277; 17 C. J. S., Contracts, par. 519, sub-division C.

The complaint stated a cause of action and it was error for the lower court to dispose of the case on the motion and to dismiss the amended complaint. The judgment of the lower court is reversed and remanded with directions to overrule the motion to dismiss and for further proceedings not inconsistent with this opinion.

Reversed and remanded with
directions.

Culbertson, J., and Scheineman, J., Concur.

(Publish Abstract only)

FILED

1937
David J. Mallitt

ABST.

3481.A.185

45731

MYRTLE JEWEL,)	
Appellee,	)	APPEAL FROM CIRCUIT COURT,
)	
v.	)	COCK COUNTY.
)	
ROBERT MUELLER,)	
Appellant.)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$344.27 for damages to an automobile growing out of a collision between plaintiff's car, driven by her husband, and a car driven by defendant. The accident occurred at a street crossing. We have examined the testimony and feel that it presents an issue of fact on which the decision of the trial court is conclusive. Defendant had a disinterested witness who testified in support of part of his story. However, plaintiff had supporting testimony with respect to the condition of the cars. At the conclusion of the trial, the court merely pronounced his finding and judgment for plaintiff.

Defendant argues that the husband, in the use of his wife's car, was a bailee; and that having paid the bill for repairs, he became the owner of the claim and the wife therefore cannot sue. Whatever may be the law in the case of a formal relationship of bailor and bailee, certainly, it is more reasonable to assume that a husband who pays for damage to his wife's car either expects to be reimbursed by her or is making a gift to her of his outlay. Nor can we consider whether the court erroneously decided that plaintiff was not chargeable with the contributory negligence of her husband. In the absence of special findings, we must

2. *How can we best understand the relationship between the individual and the community?*

assume from the record that the court decided all the issues, including that of contributory negligence, in favor of plaintiff. In considering the question of contributory negligence, we must accept the evidence most favorable to plaintiff, together with all reasonable inferences arising therefrom. Accepting the story of the husband as true, he was not guilty of contributory negligence as a matter of law. We must assume that the court weighed the evidence and found accordingly. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 Ill. 188; Roadruck v. Schultz, 333 Ill. App. 476; Blair v. Blair, 341 Ill. App. 93, and many other cases there cited.

"Judgments of courts of review must always be formed from the record and from that alone." Johaaski v. City of Chicago, 274 Ill. App. 423, 426, and authorities there cited.

Judgment affirmed.

Robson, P. J., and Tucky, J., concur.

45789

PAULINE WEBER,)	
Appellant,)	
v.	)	APPEAL FROM CIRCUIT COURT,
)	
CHICAGO TRANSIT AUTHORITY,	)	COOK COUNTY.
a municipal corporation,)	
Appellee.)	

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

In this case, plaintiff was injured November 20, 1946, as a result; it is alleged, of negligence on the part of the Chicago Surface Lines. As in the case of Barrett v. Chicago Transit Authority, No. 45700, decided by this court September 23, 1952, the liability of defendant is based upon the contract whereby it assumed the liabilities of the Chicago Surface Lines. The issue is the same as in the Barrett case, that is, whether plaintiff was required to serve notice on the Chicago Transit Authority pursuant to Ch. 111-2/3, Par. 341, of the Illinois Revised Statutes, 1951. The decision here is controlled by our decision in that case. The order of the trial court is accordingly reversed and the cause is remanded, with directions to vacate the orders appealed from, to overrule the motion of defendant to dismiss, and to require defendant to answer the complaint.

Order reversed and cause remanded
with directions.

Robson, P. J., and Tuohy, J., concur.

()
The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the
the twenty-sixth is the fact that the
the twenty-seventh is the fact that the
the twenty-eighth is the fact that the
the twenty-ninth is the fact that the
the thirtieth is the fact that the
the thirty-first is the fact that the
the thirty-second is the fact that the
the thirty-third is the fact that the
the thirty-fourth is the fact that the
the thirty-fifth is the fact that the
the thirty-sixth is the fact that the
the thirty-seventh is the fact that the
the thirty-eighth is the fact that the
the thirty-ninth is the fact that the
the fortieth is the fact that the
the forty-first is the fact that the
the forty-second is the fact that the
the forty-third is the fact that the
the forty-fourth is the fact that the
the forty-fifth is the fact that the
the forty-sixth is the fact that the
the forty-seventh is the fact that the
the forty-eighth is the fact that the
the forty-ninth is the fact that the
the fiftieth is the fact that the
the fifty-first is the fact that the
the fifty-second is the fact that the
the fifty-third is the fact that the
the fifty-fourth is the fact that the
the fifty-fifth is the fact that the
the fifty-sixth is the fact that the
the fifty-seventh is the fact that the
the fifty-eighth is the fact that the
the fifty-ninth is the fact that the
the sixtieth is the fact that the
the sixty-first is the fact that the
the sixty-second is the fact that the
the sixty-third is the fact that the
the sixty-fourth is the fact that the
the sixty-fifth is the fact that the
the sixty-sixth is the fact that the
the sixty-seventh is the fact that the
the sixty-eighth is the fact that the
the sixty-ninth is the fact that the
the seventieth is the fact that the
the seventy-first is the fact that the
the seventy-second is the fact that the
the seventy-third is the fact that the
the seventy-fourth is the fact that the
the seventy-fifth is the fact that the
the seventy-sixth is the fact that the
the seventy-seventh is the fact that the
the seventy-eighth is the fact that the
the seventy-ninth is the fact that the
the eightieth is the fact that the
the eighty-first is the fact that the
the eighty-second is the fact that the
the eighty-third is the fact that the
the eighty-fourth is the fact that the
the eighty-fifth is the fact that the
the eighty-sixth is the fact that the
the eighty-seventh is the fact that the
the eighty-eighth is the fact that the
the eighty-ninth is the fact that the
the ninetieth is the fact that the
the ninety-first is the fact that the
the ninety-second is the fact that the
the ninety-third is the fact that the
the ninety-fourth is the fact that the
the ninety-fifth is the fact that the
the ninety-sixth is the fact that the
the ninety-seventh is the fact that the
the ninety-eighth is the fact that the
the ninety-ninth is the fact that the
the hundredth is the fact that the

3481.A.186
2

45689

MARIE SCHAUER,)	
Appellee,)	
	)	APPEAL FROM SUPERIOR
v.)	
	)	COURT, COCK COUNTY.
ABRAHAM ZACHOROW et al.,)	
Defendants below.)	
_____)	
)	
On appeal of MABEL CLINGMAN,)	
Appellant.)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

In the original proceeding in equity out of which this appeal arises Marie Schauer filed her bill against Mabel Clingman, Abraham Zachorow (now deceased), and others, seeking to impress a trust upon certain improved real estate located at 4194 North Clarendon avenue, Chicago, Illinois. While this action was pending Dr. Charles Lapin and his wife filed an intervening petition alleging that they had purchased a co-operative apartment in said building and had paid the sum of \$3,500 under an agreement that the money would be returned to them if the co-operative venture failed. There was a hearing below on all the issues and on June 1, 1950 a consent decree signed by the attorneys for all the parties in interest was entered by Superior Judge Frank Padden which provided that there was due to the intervening petitioners the sum of \$3,500 and that such sum be declared a lien on the premises, to be paid to the petitioners or their assignees upon the entry of the final decree in the cause.

COLLEGE BOARD
NEW YORK, N. Y.
1900

THE COLLEGE BOARD

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

1900

Thereafter, on June 20, 1951, intervening petitioners filed a petition by an attorney other than the one who signed the consent decree, requesting the return at once of their \$3,500; and on June 29th Judge Samuel Epstein entered a further order permitting intervening petitioners to deduct their due apartment rentals of \$90 a month from the decree, thereafter entered in their favor. Mabel Clingman, one of the original defendants, appeals from this order on the grounds that the intervening petitioners' rights were adjudicated by the consent decree and that the court had no right to modify this consent decree by granting further and additional relief. No briefs have been filed here on behalf of the intervening petitioners.

It has long been the law in Illinois that where parties who are competent to contract agree to the rendition of a judgment or decree with respect to any matter which may be the subject of litigation, such final order, when entered, is by consent. Sims v. Powell, 390 Ill. 610; People v. Spring Lake, 253 Ill. 479. We are of the opinion that the order entered on June 1, 1950, by Judge Padden is a valid consent decree. This decree provided that intervening petitioners should be entitled to the return of \$3,500 at the time of the entry of the final decree in the cause. No such final decree had been entered at the time the modification order complained of was entered. No evidence was heard prior to modification, the trial judge merely stating that unreasonable delay had transpired

[illegible]

-3-

and upon that basis entered the order. The court erred in so doing as it clearly appears from the Illinois authorities that before a consent decree may be modified the original decree must be set aside by proceedings properly instituted. Sims v. Powell, 390 Ill. 610; Knobloch v. Mueller, 123 Ill. 554; City of Kankakee v. Lang, 323 Ill. App. 14; First National Bank of Chicago v. Whitlock, 327 Ill. App. 127.

Accordingly the modification order of June 29, 1951, of the Superior Court of Cook County is reversed.

Order reversed.

Robson, P. J., and Schwartz, J., concur.

...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...

...

45719

MARIANA MILANO, Executrix of the)	
Last Will and Testament of)	
Bart Milano, deceased,	)	APPEAL FROM CIRCUIT
Appellant,)	
v.	)	COURT, COOK COUNTY.
)	
THE TRUST COMPANY OF CHICAGO,)	
Appellee.)	

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Bart Milano sued defendant for the conversion of \$9,000. During the pendency of the litigation the death of Bart Milano was suggested and his executrix substituted as party plaintiff. There was a trial by jury and a verdict for plaintiff in the sum of \$11,025, being the principal amount claimed plus interest. Judgment notwithstanding the verdict was entered in favor of defendant, and simultaneously an order was entered allowing defendant's motion for a new trial. This appeal is taken from both orders.

The complaint alleges substantially that in the summer of 1946 plaintiff opened an escrow with defendant "for the handling and consummation of a certain real estate transaction then being negotiated through the medium of said Escrow No. 774"; that as a part of said escrow plaintiff was to deposit the sum of \$9,000 which was to be used temporarily by defendant or its agents in the financing of said escrow and consummation of such transaction, that on September 16, 1946, plaintiff delivered to defendant for deposit in said escrow a

THESE ARE THE

REMARKS OF

THE

IN

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

THE

cashier's check in the sum of \$6,000 payable to the order of plaintiff and indorsed by him in blank, receiving a commitment that upon consummation of the escrow the defendant would pay the plaintiff the sum of \$6,000 and that the escrow was to be closed on or before November 1, 1946; that on September 19, 1946, plaintiff delivered to defendant another cashier's check payable to plaintiff's order and by him indorsed in blank in the sum of \$3,000 and received the same commitment; that after November 1, 1946, plaintiff demanded the payment of the sum of \$9,000 but defendant refused to pay any part of said amount.

Defendant denied that it opened any escrow with plaintiff or that it received any deposits in any said escrow or that plaintiff was required to make any such deposits.

Consideration of the judgment notwithstanding the verdict necessitates that the evidence be viewed in the light most favorable to plaintiff.

It appears that on September 16, 1946, the document referred to as escrow No. 774 was executed by J. S. Waters and C. L. Burnett, both strangers to this lawsuit, in which it was recited that Waters had deposited \$35,000 and Burnett a deed together with certain emoluments of title to certain residence property located in the City of Chicago. The document was not executed by the defendant company but was placed among its real estate escrow files and we shall treat it as an accepted escrow. There is

no recitation in the agreement that plaintiff was to deposit in the escrow any amount of money. Nor is there any reference whatsoever to plaintiff. On the date the escrow was executed by Waters and Burnett, Bart Milano, his attorney, and Burnett spoke about the escrow to an officer of defendant company. Milano on this occasion displayed a cashier's check drawn by a Chicago bank in the sum of \$6,000 and indorsed in blank by Milano. There is some testimony that the check was handed by Milano to a stenographer who in turn handed it to an officer of defendant. This is denied by the officer, but in reviewing the evidence most favorable to plaintiff must be accepted as established. The officer, upon written instruction from Burnett, then dictated and signed a memorandum which he gave to Milano. It is as follows:

"Escrow No. 774

"Dear Sir: Upon consummation of the above Escrow we are to pay you the sum of Six Thousand and 00/100 Dollars (\$6,000.00).

"This Escrow is to be closed on or before November 1, 1946 by the terms thereof."

On September 19th a letter, signed by the same trust officer, was given to Bart Milano in words as follows:

"In re: Escrow No. 774,

"Dear Sir: We have been authorized to pay you on or before November 1, 1946 upon consummation of Escrow No. 774 the sum of \$3,000.00."

1875. The first of these was the
establishment of the first
school in the district. This
was done by the Rev. Mr. [Name]
who had been for some years
connected with the [Name] Church.
The school was at first a
small affair, but it grew
rapidly, and in a few years
it had become one of the
most important institutions
in the district. The
Rev. Mr. [Name] was
the first teacher, and he
was succeeded by [Name].
The school was at first
held in a small building,
but it was soon found
that this was not sufficient,
and a new building was
erected. This building was
the first of the kind in the
district, and it was a
great success. The school
was open for several years,
and it was found that it
was a great benefit to the
district. The Rev. Mr. [Name]
was the first to establish
the school, and he was
succeeded by [Name].

The school was at first
held in a small building,
but it was soon found
that this was not sufficient,
and a new building was
erected. This building was
the first of the kind in the
district, and it was a
great success. The school
was open for several years,
and it was found that it
was a great benefit to the
district. The Rev. Mr. [Name]
was the first to establish
the school, and he was
succeeded by [Name].

The written instruction from Burnett to defendant directed the latter to pay Bart Milano \$3,000 "upon consummation of Escrow No. 774." There is no testimony in the record that the \$3,000 check was seen or handled by any employee of defendant. It further appears uncontradicted that the \$9,000 represented by the checks in question was not entered upon defendant's books or placed in the escrow. On the contrary, the uncontradicted proof shows that both checks were indorsed by Burnett and negotiated for currency at the City National Bank of Chicago on the day following this transaction.

The question presented is whether or not in this state of the record plaintiff has proven the case alleged in the pleadings. A plaintiff must recover on the case made by his complaint supported by evidence. Burroughs v. Mefford, 387 Ill. 461. Under the allegations of this complaint it was necessary for plaintiff to prove that as part of the escrow agreement plaintiff was to deposit \$9,000 with defendant which was to be repaid to plaintiff in accordance with the memoranda which embodied the written instructions of Burnett and that the said escrow agreement had been consummated. Nowhere in the record does it appear that plaintiff was required to make any deposit with defendant under the terms of the escrow agreement or otherwise. Milano was not a party to the escrow agreement. Whatever arrangement existed with reference to any money on deposit was presumably an agreement dehors the escrow and existed,

if at all, between Milano and Burnett. The evidence, viewed most favorably to plaintiff in this respect, is that Burnett instructed defendant to pay Milano \$9,000 upon the consummation of the escrow which the parties anticipated would be on or before November 1, 1946, out of funds deposited there by Burnett; but nowhere in the record does it appear that this escrow was ever consummated. The records of defendant indicate that it was not. The jury in a special interrogatory found it was not. Assuming that Milano gave defendant these checks for \$9,000 as part of this not any too clear escrow arrangement, in the absence of consummation of the escrow there was no obligation on the defendant to repay plaintiff.

After the jury's verdict plaintiff sought leave to amend the complaint by filing an additional count for money had and received. Leave to file this count was denied. While it is not contended that there was error in the trial court's ruling in this respect, plaintiff argues here that the question with respect to the escrow is mere surplusage and that the material evidence adduced on the trial of the cause created an issue of fact on the question of whether or not the plaintiff's decedent had paid over to defendant the sum of \$9,000 under circumstances implying a promise to repay. This is a different theory than that upon which the case was tried below. It is elemental that a party cannot try a case on one theory in the trial court and on another theory in a court of review. Chicago Title

and Trust Co. v. DeLasaux, 336 Ill. 522, 529. But even on the money had and received theory, the only explanation offered as to defendant's receipt of money from Milano is on the basis of the facts herein set forth. Such facts are not sufficient to support a verdict.

The action of the trial court in entering judgment notwithstanding verdict was proper and, that being so, no questions remain to be settled on a new trial. Accordingly the judgment entered by the Circuit Court of Cook County notwithstanding verdict is affirmed and the order granting a new trial is reversed.

Affirmed in part and reversed
in part.

Robson, P. J., and Schwartz, J., concur.

45760

A. E. HANDSCHY COMPANY, a
corporation,

Appellee,

v.

ROWEN LITHO PRESS, INC., a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered upon the pleadings in the sum of \$10,160.97 and costs in an action for goods sold by plaintiff to defendant. The statement of claim alleges that there was a balance due for merchandise sold by plaintiff to defendant for the sum claimed and that the defendant's indebtedness to plaintiff is acknowledged in a writing a copy of which attached to the statement of claim reads:

"June 13, 1951

"This is to certify that, for merchandise received, the Rowen Litho Press, Inc. is indebted to A. E. Handschy Company of 125 South Racine Avenue, Chicago, Illinois, in the amount of \$10,160.97.

"This indebtedness is to be paid off when and as we are able to do so.

"Rowen Litho Press, Inc.

"Rudolph Rowan, Pres.
Title."

Defendant's amended defense denies that it is indebted to plaintiff in the sum claimed and interest thereon. It also avers that plaintiff orally agreed for a valuable consideration that plaintiff "would not sue or prosecute any claim against the defendant."

the first of these is the fact that the
 the second is the fact that the
 the third is the fact that the
 the fourth is the fact that the
 the fifth is the fact that the
 the sixth is the fact that the
 the seventh is the fact that the
 the eighth is the fact that the
 the ninth is the fact that the
 the tenth is the fact that the

the first of these is the fact that the
 the second is the fact that the
 the third is the fact that the
 the fourth is the fact that the
 the fifth is the fact that the
 the sixth is the fact that the
 the seventh is the fact that the
 the eighth is the fact that the
 the ninth is the fact that the
 the tenth is the fact that the

the first of these is the fact that the
 the second is the fact that the
 the third is the fact that the
 the fourth is the fact that the
 the fifth is the fact that the
 the sixth is the fact that the
 the seventh is the fact that the
 the eighth is the fact that the
 the ninth is the fact that the
 the tenth is the fact that the

the first of these is the fact that the
 the second is the fact that the
 the third is the fact that the
 the fourth is the fact that the
 the fifth is the fact that the
 the sixth is the fact that the
 the seventh is the fact that the
 the eighth is the fact that the
 the ninth is the fact that the
 the tenth is the fact that the

An examination of the record discloses that on plaintiff's motion defendant's first amended bill of particulars was stricken and that the second amended bill of particulars is substantially the same as the first except that it is verified. Plaintiff served notice on the defendant that it would move to strike the second amended bill of particulars on the ground that it failed to show a consideration for the plaintiff's alleged forbearance to sue.

The judgment order here appealed from reads as follows:

"Now comes the plaintiff in this cause and moves the Court to strike second amended Bill of Particulars and the Court being fully advised in the premises sustained said motion, and

"Now comes the plaintiff in this cause and moves the Court for judgment on the pleadings and the Court being fully advised in the premises sustained said motion and thereupon it is ordered that judgment be and the same is hereby entered on the pleadings against the defendant, Rowen Litho Press, Inc., a Corporation, damages Ten Thousand One Hundred Sixty and 97/100 Dollars (\$10,160.97) together with costs.

"Appeal Bond \$12,000.00."

The order here appealed from shows that the judgment was entered on the pleadings. In construing §37 of the Civil Practice Act (Par. 161, ch. 110, Ill. Rev. Stats. 1951) this court held in Martin v. Svoboda, 335 Ill. App. 379, that a bill of particulars is not a pleading and that a motion to strike under that section is in effect a motion for a more particular bill.

Where a pleading is substantially insufficient in law, in order to enter a judgment on the pleadings the provisions of §45 of the Civil Practice Act (ch. 110, §169, Ill. Rev. Stats. Bar Ass'n Ed. 1951) must be complied with

by pointing out "specifically the defects complained of." Gulf, M. & O. R. Co. v. Arthur Dixon Transfer Co., 343 Ill. App. 148; Lederer v. St. Clair Hotel Co., Inc., 339 Ill. App. 214. This was not done in the instant case. Here the matter came before the court on plaintiff's motion to strike the second amended bill of particulars under the provisions of §37 relating to bills of particulars. No objections were raised by motion attacking the sufficiency of the defense filed by defendant in accordance with the provisions of §45, nor was any disposition made of the defense. It still stands, and the cause was at issue when the judgment was entered. The trial court ruled only on the bill of particulars and based the judgment on that ruling. In the case last cited, Lederer v. St. Clair Hotel Co., Inc., 339 Ill. App. 214, at page 225, this court said: "This section [45] abolishes demurrers and substitutes a motion in the nature of a special demurrer, in that the motion must point out specifically the defects complained of and ask for such relief as the nature of the defects may make appropriate. A motion which fails to allege facts pointing out specifically the defects complained of and to ask for such relief as the nature of the defects may make appropriate, is insufficient in law and will not be entertained by the court."

For the reasons given, the judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

FEINBERG AND KILEY, JJ., CONCUR.



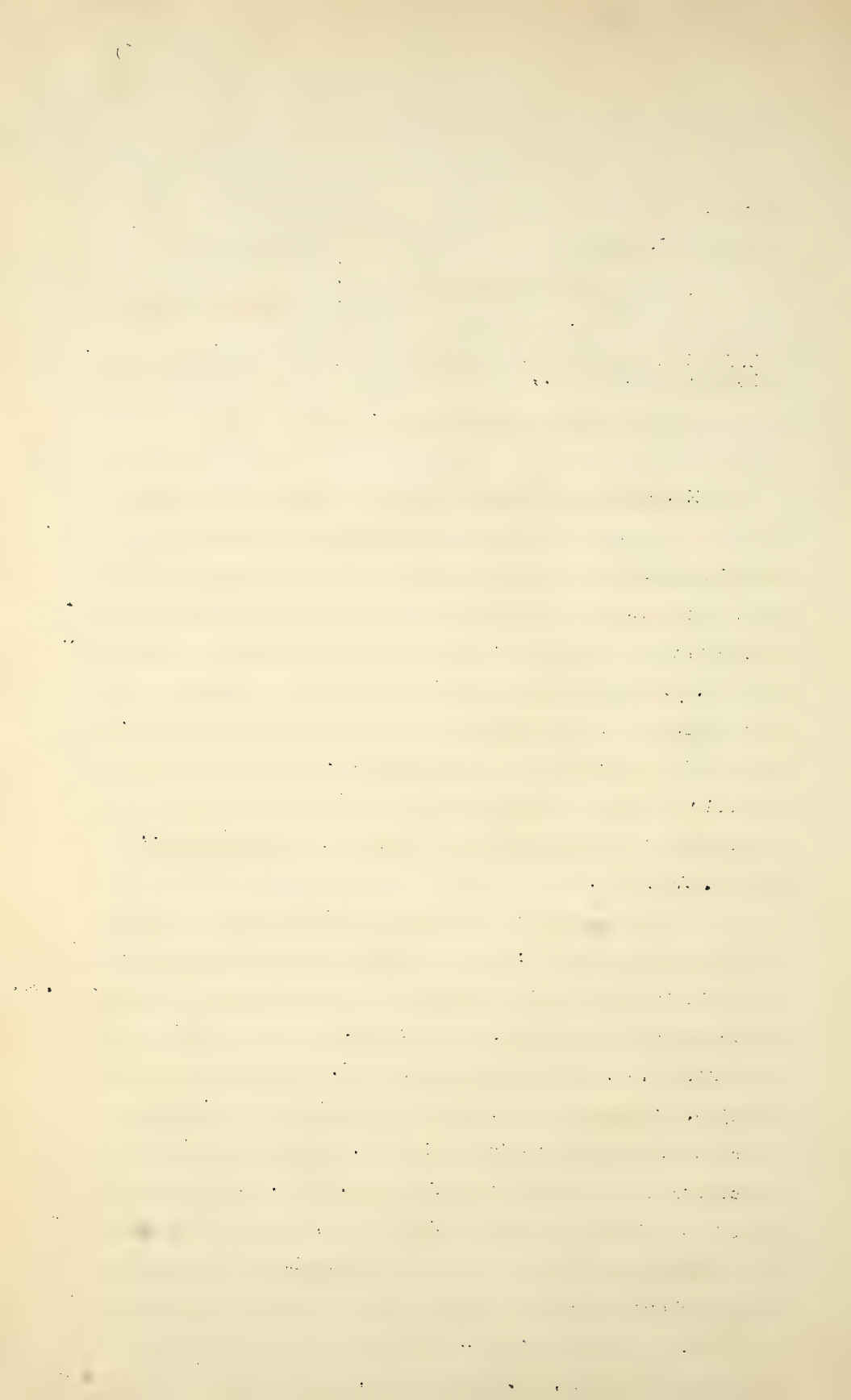
45771

CHARLES J. RUSSELL,	)	APPEAL FROM
)	
Plaintiff - Appellant,)	
	)	SUPERIOR COURT,
v.)	
)	
LOUIS MELIND COMPANY, an Illinois	)	COOK COUNTY.
Corporation, et al.,)	
)	
Defendants - Appellees.)	

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by a stockholder seeking a judgment for the par value of stock which is alleged to have been confiscated by the defendant company and its directors. The trial court dismissed the complaint on motion of defendants. Plaintiff appealed directly to the Supreme Court on the ground that constitutional questions were involved. The appeal was transferred to this Court. This Court previously affirmed a decree dismissing plaintiff's suit against defendants for an accounting. Russell v. Melind Co., 331 Ill. App. 182.

The effect of the motion to dismiss was to admit the following facts: The Melind Company was incorporated in Illinois in 1914 with an authorized capital stock of \$60,000.00, or 600 shares of \$100.00 par value. This was increased to \$120,000.00, or 1200 shares of \$100.00 par value in November 1926. On December 31, 1926 a certificate of 292 shares of stock was issued to Julius Melind. He sold his 292 shares of stock to the plaintiff March 22, 1943. A special meeting of the directors was held January 13, 1943, and a resolution was passed recommending to the shareholders the amendment of the charter changing the character of the capital stock from \$100.00 par value to no-par value and the number of shares from 1200 to 10,000. February 3, 1943 the amendment passed 908 to 292, Julius Melind casting the "no" votes.



March 12, 1943 a resolution was passed, recommending to the stockholders that the issuance of the 8400 shares of the new stock be offered at \$4.00 per share, and that holders of the old shares be given priority in subscribing for the new. March 25th the shareholders passed a resolution, in conformity with the recommendation, which gave shareholders the right to purchase 7 shares of new stock at \$4.00 per share for each share of old stock held. Plaintiff was present at the meeting and demanded that a new certificate for 292 shares of \$100.00 par stock be issued him in exchange for the certificate assigned to him by Julius Melind. The demand was rejected and a record transfer of the Julius Melind stock to plaintiff denied unless he accept no-par value stock. Plaintiff was denied the right to vote on the resolution. A second demand by plaintiff that the record transfer be made as of March 22, 1943 was denied. After the plaintiff's second demand was refused, he began a mandamus suit to compel the transfer "as of March 22, 1943" and the issuance to him of 292 shares of \$100.00 par value stock. The defendants, being the same as in the instant action, answered that plaintiff had not complied with the by-laws governing stock transfers. The defendants admitted at the time and the trial court judge, though denying the petition prayed for, found that plaintiff was the owner of the stock.

Those factual allegations are the basis for plaintiff's charge that the directors in changing the value of the "preference" shares was a fraud upon him, depriving

The first thing I noticed when I stepped out of the car was the cold, crisp air. It was a relief after the warm, stuffy interior. I looked up at the sky, which was a pale, hazy blue. The sun was just starting to rise, casting a soft, golden glow over the landscape. The ground was covered in a thick layer of snow, and the trees were bare and skeletal. I took a deep breath and felt a sense of peace. This was a new world, a world of endless possibilities. I was here to explore, to discover, and to learn. I was here to make a difference. I was here to live.

I walked for miles, my boots crunching on the snow. I saw many things that I had never seen before. There were strange, colorful plants and animals. There were people with long, flowing robes and pointed ears. There were cities with floating islands and flying cars. I was in a world of magic and wonder. I was in a world of adventure and excitement. I was in a world of hope and dreams.

I met many people along the way. Some were friendly and helpful, while others were hostile and dangerous. I learned a lot from them. I learned about their customs and traditions. I learned about their strengths and weaknesses. I learned about their hopes and dreams. I learned about their lives. I learned about their world.

I was in a world of endless possibilities. I was in a world of adventure and excitement. I was in a world of hope and dreams. I was in a world of magic and wonder. I was in a world of people who were different from me. I was in a world of people who were like me. I was in a world of people who were all of us. I was in a world of people who were all of us.

I was in a world of endless possibilities. I was in a world of adventure and excitement. I was in a world of hope and dreams. I was in a world of magic and wonder. I was in a world of people who were different from me. I was in a world of people who were like me. I was in a world of people who were all of us. I was in a world of people who were all of us.

him of vested rights, and confiscated his property in violation of his constitutional rights to due process. He prayed for findings that his stock was confiscated, and that on May 25th an "Express Trust" was created for his benefit. He prayed finally for a judgment for \$29,200, the par value of the stock, and for general relief.

The defendants filed answers. These were withdrawn with leave of court and in their stead was filed a motion to dismiss the complaint. In the order appealed from the chancellor gave leave to withdraw the amended answers. The answers and amended answers are therefore out of the case. What motions of plaintiff, directed at the pleadings, were pending at the time went out of the case with the withdrawn pleadings.

The grounds stated in the motion to dismiss are that the complaint shows the amendment changing the character of the stock and number of authorized shares was legally adopted; that it shows that the plaintiff was offered but rejected his preemptive rights; that the stock upon which the plaintiff bases his relief is non-existent; and that the suit is barred under the res judicata rule. The decree in sustaining the motion to dismiss found that the charter amendment with respect to the stock was validly made, and the plaintiff was given his preemptive right which he refused to exercise. The complaint was dismissed for want of equity.

Plaintiff argues in his brief, that the resolution of the directors with respect to the stock changes was invalid because no legal quorum was present; that the amendment was

retroactive, and deprived him of vested rights without due process; that since shares are "choses in action" (Russell v. Melind Co., 331 Ill. App. 182) he received all rights of Julius Melind in the shares bought by him; and that he was precluded from exercising his preemptive rights.

We presume in favor of the decree that the court read all the pleadings and exhibits. This presumption is fortified by the order appealed from, which states, and the contrary is not shown, that arguments were heard. Moreover leave to withdraw the amended answer was given in order to overcome the objection in the plaintiff's "reply" that the motion to strike was pending.

There is no allegation of fact from which we can infer that the passing of the 1937 by-laws, resolution or the amendment were irregular or illegal. It is argued that only the directors were present when the resolution was passed, and that the one who moved the passage voted for the motion and that there could therefore be no lawful majority. No authority was cited and we see no merit in this argument.

The defendant through its directors and shareholders had a right to amend the corporate charter changing the 1200 shares of par value common stock into 10,000 shares of no-par value. (Chap. 32, Par. 157.52(e)). The allegations show expressly or by implication that the directors adopted the appropriate resolution, gave due notice of the meeting at which the proposed amendment would be submitted to a vote and that the amendment was adopted by at least two-thirds of the shares entitled to vote. The amending procedure was accordingly in compliance with law. (Chap. 32, Par. 157.53)

Plaintiff's reliance upon Western Foundry Co. v. Wicker, 335 Ill. App. 106 is unavailing because the judgment, in that case was reversed by the Supreme Court, 403 Ill. 260, and the issues revolved about the cancellation of accumulated preferred stock dividends. The fact is that since the Supreme Court in Western Foundry Co. v. Wicker, 403 Ill. 260 decided and that the right of preferred stockholders are but simple contract_A not vested rights, that case applies with greater force against plaintiff's claims based on common stock. Plaintiff's claim that he has a vested right by virtue of his common stock is without merit. The same is true of his other arguments which assume that the shares he had were preferred. His use of the term "preferred" in his argument is different from the use of the term in the statute upon which he relies. He relies on Sec. 61 of the Corporation Act of 1919 to support his claim of preference. The record before us clearly shows that the stock certificate upon which the plaintiff's theories were based is for common stock.

Since the amendment was regularly adopted, and violated no rights of the plaintiff, it follows that the defendants were under no obligation to issue a new certificate in exchange for the certificate held by plaintiff. This was the condition attached to his demand for the record transfer of his stock. He sought unsuccessfully to mandamus the transfer in Russell v. Melind, Case #43 S 7861 in the Superior Court, Cook County. It appears no appeal was taken. The amendment being lawful, there is no merit in plaintiff's contention that a trust was created in his favor by the action

1. The first part of the paper

is devoted to a general discussion of the

principles of the method of moments

and its application to the

estimation of the parameters of the

normal distribution.

The second part of the paper

is devoted to a detailed

analysis of the method of moments

and its application to the

estimation of the parameters of the

normal distribution.

The third part of the paper

is devoted to a detailed

analysis of the method of moments

and its application to the

estimation of the parameters of the

normal distribution.

The fourth part of the paper

is devoted to a detailed

analysis of the method of moments

and its application to the

estimation of the parameters of the

normal distribution.

The fifth part of the paper

is devoted to a detailed

of the directors. Neither is there any merit to the contention that the amendment was a special law.

Plaintiff alleges that he demanded redemption of his shares under Sec. 73 of the Business Corporation Act. (Chap. 32, Ill. Rev. Stat.) That section of the Act provides redemption of a dissenting shareholder's shares in the event of a "sale of or exchange of all or substantially all of the property or assets" of a corporation. Obviously it has no application to this case. Neither is the rule stated in Kresin v. Brotherhood of American Yeomen, 217 Ill. App. 448 applicable since there is no doubt that the defendants in adopting the resolution under which the order was passed were not violating a higher law.

We conclude therefore that the trial court did not err in dismissing the complaint, which did not state a cause of action on the vested right theory, nor under Sec. 73 of the Business Corporation Act. The judgment is affirmed.

AFFIRMED.

LEWE, P.J. AND FEINBERG, J. CONCUR.

1. The first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

45773

JOHN R. HOLLAND and MILTON LEVINDAHL,
d/b/a THE AUTOMATIC COIN MACHINE
COMPANY; and SIDNEY KENT, d/b/a
DREXEL VIEW TAVERN,

Plaintiffs - Appellees,

v.

TIMOTHY R. O'CONNOR, Commissioner of
Police of the City of Chicago; CITY
OF CHICAGO, a Municipal Corporation;
and MARTIN H. KENNELLY, Mayor of the
City of Chicago,

Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a chancery action seeking an injunction to prevent interference by the Chicago police and other city officials with the operation of the Booster, an automatic machine, used in taverns, restaurants, cocktail lounges and bowling alleys. The chancellor found for the plaintiffs, and ordered the issuance of the injunction. Defendants have appealed.

Plaintiffs, Holland and Levindahl, sell the Boosters to taverns, restaurants etc., and plaintiff, Kent, is a tavern owner in whose place of business the Chicago police officers confiscated a Booster and arrested Kent.

The Booster consists of two units. The first unit is a machine which stands 27 inches high, 16 inches wide, and 16 inches deep. It is operated by a lever on the righthand side, which when pulled sets in revolution 3 drums which are marked with figures of bars, bells, cherries, oranges, and lemons similar to slot machines. The three drums revolve simultaneously, and when the revolutions cease an arrangement of three figures is presented, behind a glass face, to the view of the player.

1871

1872

1873

1874

1875

1876

-2-

This unit is connected to the second unit by an electric cord. The second unit is incased in plywood and is called the "booster box" which computes and records, to the view of the player, the score according to a schedule of the points given the various arrangements of the figures. This schedule of points is carried on the front of the first unit. In the booster box is the machine which controls the operation of the first unit, and which computes and records the scoring and indicates the number of plays to which the player is entitled. The number of plays depends upon the price charged per play; the minimum being 10 cents for one play.

The Booster has no slots for the reception of coins, and accordingly the insertion of a coin does not make the machine ready for play. The player pays a person for the number of plays contemplated. This person then sets the mechanism in operation.

The decree found that Kent was arrested for the possession of a Booster on the grounds that he was gambling, and was in possession of gambling equipment; that he was tried on the two charges in the Municipal Court and found not guilty; that Holland and Levindahl made several unsuccessful attempts to obtain city licenses for the Boosters, but their applications were denied because the machines were not coin operated and not within the purview of the licensing ordinance; that the Booster does not pay out money, tokens or merchandise; that its operation is not controlled by deposit of coins or tokens; and that it does not fall within the provisions of any Chicago prohibitory ordinances.

100

101

102

103

104

105

106

107

108

109

110

111

112

113

114

115

116

117

118

119

120

121

122

123

124

125

126

127

128

129

130

131

132

133

134

135

136

137

138

139

140

141

142

143

144

145

146

147

148

149

150

151

152

153

154

155

156

157

158

159

160

161

162

163

164

165

166

167

168

169

170

171

172

173

174

175

176

177

178

179

180

181

182

183

184

185

186

187

188

189

190

191

192

193

194

195

196

197

198

199

200

The question is whether the decree is erroneous and the injunction improvidently issued.

The uncontradicted testimony shows that the Booster is a game of chance in which the lucky player is awarded by additional free plays, and, in Kent's tavern, by merchandise. The finding that the Booster "does not pay out any reward..." is not based on the evidence, unless the word "out" implies through the Booster. In our view, neither this fact, if that is the implication, nor the absence of a slot is substantial. We think the finding that the Booster does not violate any prohibition of the Municipal Code is erroneous. The free plays for winning combinations (People v. One Pinball Machine, 316 Ill. App. 161) and merchandise are valuable things. And since they are won or lost upon the results of the action of the Booster device Sec. 191-5 of the ordinance was violated. The discharge of Kent on the trial of the alleged offense for which he was arrested did not determine otherwise. Kent v. City of Chicago, 301 Ill. App. 312.

The use of the device being in violation of law, the chancellor was without jurisdiction to restrain the defendants from interfering with the use of the Booster, and from seizing or confiscating it. The injunction amounts to a blanket restraint upon public officials in enforcing the law. D. Gottlieb Co. v. City of Chicago, 342 Ill. App. 523; Kent v. Chicago, 301 Ill. App. 312; City of Chicago v. O'Hare, 124 Ill. App. 290.

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

... ..
... ..
... ..

Finally, the court has held repeatedly in cases of this kind that where mandamus is available equity has no jurisdiction. Coven Distributing Co., Inc. v. Chicago, 346 Ill. App. 448; D. Gottlieb Co. v. City of Chicago; City of Chicago v. O'Hare.

We think it is unnecessary to go further. The decree is reversed.

REVERSED.

LEWE, P.J., AND FEINBERG, J. CONCUR.

4. 1955 - 1956

1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

3481.A.189
2

45867

REPUBLICAN CENTRAL COMMITTEE)	
OF COOK COUNTY,)	
	)	Appellee,
)	
v.	)	INTERLOCUTORY APPEAL
)	
COOK COUNTY REGULAR REPUBLICAN	)	FROM SUPERIOR COURT,
ORGANIZATION, an Illinois)	
Corporation, and WILLIAM F.	)	COOK COUNTY.
GAILING,)	
)	
	)	Appellants.

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendants come here on an interlocutory appeal from an order denying defendants' motion to dissolve a temporary injunction issued May 14, 1952 without notice and without bond.

The complaint alleges that the plaintiff is an organization existing by virtue of the statutes of the State of Illinois; that for more than sixty years it was known as the Cook County Regular Republican Organization and was so-called until 1927, when the general Primary law was passed, at which time the organization became known as the Republican Central Committee of Cook County; that notwithstanding the change of name plaintiff continues to be known as the Cook County Regular Republican Organization and is advertised as such; that plaintiff is the only body authorized by law as the central or managing committee of the Republican party in and for Cook County and has the inherent power to do all things necessary in the managing of elections and campaigns of the Republican party; that one of the functions of the plaintiff is to solicit money for political objectives; that defendant

William F. Gailing has falsely and fraudulently represented to members of the public that he was county chairman of the Regular Republican Organization of Cook County, has indorsed checks received by him as contributions in such manner, has falsely represented to the public that he was in control of the affairs of plaintiff and had charge of the campaigns of the party and the collection of funds; that by means of said false representations said defendant has been collecting money from the public which was in reality intended to be turned over to plaintiff; that he has not done so, nor has the money been used to further the purpose of the plaintiff organization but on the contrary on various occasions during the election campaigns defendant has placed advertisements in various newspapers in the City of Chicago for certain Democratic candidates for office, said advertisements bearing the name of the defendant corporation, which further confuses, misleads and defrauds the public and plaintiff; that the use of the name Cook County Regular Republican Organization by defendant Gailing was for the express purpose of deceiving, defrauding and misleading members of the public in believing they were contributing to the plaintiff when as a matter of fact said funds were being used to defeat the purposes and objectives of the plaintiff; that Gailing is soliciting and collecting contributions for his own use and defrauding the public with the result that large sums of money intended for the plaintiff will be turned over to the defendant to the irreparable

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

— *Journal of the American Medical Association*, 1997

1990

... 7541

Journal of Management Studies, 19(1), 67-80.

• • • • •

injury of the plaintiff unless the defendant is enjoined from continuing his fraudulent practices.

Defendants urge (1) that the injunction was wrongfully issued for the reason that a political committee is a voluntary association and cannot maintain a suit in its own name, and (2) that the court had no right under the allegations of the complaint to issue the temporary injunction without notice and without bond.

Plaintiff is a voluntary association recognized under paragraph (g) of section 9 of the Primary Act of 1927 (Ill. Rev. Stat. chapter 46), the constitutionality of which was upheld in The People v. Kramer, 328 Ill. 512. The courts of this State have generally held that a voluntary association may not maintain an action at common law (Cahill v. Plumbers Gas and Steam Fitters, etc., 238 Ill. App. 123; Kingsley v. Amalgamated Meat Cutters etc., 323 Ill. App. 353; Montgomery Ward & Co., Inc. v. Franklin Union, 323 Ill. App. 590; Pullman Standard Car Mfg. Co. v. Local Union No. 2928, 152 F.(2d) 493), because it has no legal existence separate and distinct from its individual members. Such, however, is not the rule in equity where the doctrine of representative or class suits is recognized and where action may be brought by or against the association as representative of the membership of the association. Maywood Farms Co. v. Milk Wagon Drivers' Union, 316 Ill. App. 47; Anderson & Lind Mfg. Co. v. Carpenters' Council, 308 Ill. 488; Biller v. Egan, 290 Ill. App. 219; Milk Wagon Drivers' Union, etc. v. Associated Milk Dealers Inc.

et al., 42 F. Supp. 584. The cases cited by defendant in support of its proposition are all cases at law.

We conclude, therefore, that the plaintiff in this suit is a proper party plaintiff.

A more serious question is presented by the issuance of this injunction without notice and without bond.

Section 3 of the Injunction Act (Ill. Rev. Stat. chap. 69) provides:

"No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, * * * unless it appears, from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice."

Section 9 provides:

"In all other cases, before an injunction may issue, the plaintiff shall give bond in such penalty, upon such condition and with such security as may be required by the court or judge: Provided, bond need not be required when, for good cause shown, the court or judge is of opinion that the injunction ought to be granted without bond."

- No affidavits were filed in support of the complaint and we have carefully examined the pleading for any allegations that would bring it within the provisions of the statute above quoted providing for the issuance of an injunction without notice and without bond. We find no such allegations. To support its contention in this respect plaintiff relies solely upon the averment in the complaint that "if notice is given to defendant of its application for such restraining order it will work a hardship upon plaintiff and, therefore, it is asked that a temporary injunction issue without notice to the defend-

ant." Such statement falls far short of the averment of undue prejudice which the statute requires. Moreover, upon the question of bond there is no allegation whatsoever to justify the issuance of the restraining order. The statute gives the trial court certain discretion in determining when good cause is shown for the issuance of an injunction without bond, but the discretion is not an arbitrary one. In the case of Skarpinski v. Veterans of Foreign Wars, 343 Ill. App. 271, a very good statement indicating caution which must guide the court in the issuance of injunctions without notice appears in the following language (p. 274):

"Even when granted upon a full and final hearing, injunctions are considered extraordinary remedies. They are more than extraordinary when granted after notice for a temporary period without issue having been joined and a hearing had. How extraordinary then must be the circumstances under which they should be granted without notice to the opposing party. In the most primitive concepts of justice, one of the fundamental requisites for the exercise of judicial authority over the person or property of another is notice. The exceptions to this rule are rare, indeed. They embrace cases where by a stroke of the pen, a movement of the hand, or a tour de force executed overnight the defendant intends to and can destroy the substance of the litigation and thus defeat the power of the court to do justice. Caution and circumspection must be the watchwords to guide the court's action and any doubts as to its wisdom must be resolved against the action. Only where these standards are meticulously observed will such orders survive review, for when an injunction is issued without notice in a case where notice should have been given, this court will reverse the order upon that ground without regard to any other question. This has been the law as laid down in decisions of this court for more than half a century."

We have adhered to this rule in a long line of cases, including Sonney v. Enterprises v. Astor Entertainment Co., 339 Ill. App. 275; Eager v. Glens Falls Indemnity Co.,

335 Ill. App. 578; and Crown Bldg. Corp. v. Monroe Amusement Corp., 326 Ill. App. 430.

Wherefore the order denying the motion to dissolve the temporary injunction is reversed and the cause remanded with directions to vacate the order of May 14, 1952 granting the temporary injunction.

Reversed and remanded with
directions.

Febson, P. J., and Schwartz, J., concur.

3481.A. 190

45717

BETTY LOUISE DYER,

Plaintiff - Appellant,

v.

ROGER J. MARCY, JR., individually and
as trustee under the last will and
testament of ROGER J. MARCY, SR.,
DECEASED,

Defendant - Appellee.

ROGER J. MARCY III, ROBIN HOOD MARCY,
DONNA LYNN MARCY, and MICHAEL W. DYER,

Defendants - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to remove a testamentary trustee, for reimbursements and payments from the trust, and for an accounting. The trustee filed a counterclaim asking for a construction of the trust instrument. The chancellor found that certain contingencies in some of the provisions of the trust instrument violated the rule against perpetuities and, by implication, found that they were not separable from the valid parts of those provisions, and that the remaining provisions were void for uncertainty. He did not pass upon the question whether the trustee should be removed. The decree ordered the trust assets delivered to Roger J. Marcy, Jr., as executor, for administration, and to be distributed to him as residuary legatee. Plaintiff, and her co-beneficiary-defendants, have appealed.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is essential for ensuring transparency and accountability in the organization's operations.

2. The second part outlines the specific procedures and protocols that must be followed when recording transactions. This includes details on how data should be collected, stored, and reviewed to ensure its integrity and reliability.

3. The third part addresses the role of the management team in overseeing the record-keeping process. It stresses that management must ensure that all staff are properly trained and that the necessary resources are provided to support the system.

4. The fourth part discusses the importance of regular audits and reviews to identify any discrepancies or areas for improvement. It suggests that these should be conducted at regular intervals and by independent parties to maintain objectivity.

5. The fifth part concludes by reiterating the commitment to high standards of record-keeping and the expectation that all staff will adhere to the established guidelines.

The trust was created in the will of Roger J. Marcy, Sr., made January 9, 1945. The testator died February 28, 1946. The trust assets consisted of 1196 shares of Union Carbide and Carbon stock which, at the time of trial, had increased to 3588 shares. Roger J. Marcy, Jr., son of the testator, was named trustee, and the Northern Trust Company of Chicago successor-trustee. When the trust was created the testator had three grandchildren, the children of Roger J. Marcy, Jr.. These are Betty Louise Dyer, her brother Roger J. Marcy III, and their stepbrother Robin Hood Marcy, now about 27, 25, and 10 years of age respectively. Betty and Roger III are the children of Roger, Jr. by his first wife, from whom he is divorced, and Robin Hood is the child of a later marriage. Betty is married to Russell A. Dyer, and is the mother of Michael W. Dyer, born August 5, 1950. Roger III is married and the father of Donna Lynn Marcy, born October 6, 1949. Guardians ad litem were appointed for Robin Hood, Michael and Donna.

Roger Jr., testator's son, is not a beneficiary of the trust. He is residuary legatee under the will. His children, testator's grandchildren, and their issue are the trust beneficiaries. The grandchildren, Betty, Roger III and Robin Hood, are the only beneficiaries specifically named. The pertinent provisions of the trust are in the Third Article of the will as follows:

"Third: . . .

"When Betty...becomes fifty years of age, she shall receive, if living, one-third of the trust ~~estate~~ and Roger..., if living, shall receive one-third, and Robin Hood..., if living, shall receive...one-third....

"Should Betty...die before reaching the age of fifty years, one-third of said trust estate shall, if she dies leaving issue by blood...be held by the Trustee for...her issue, and said one-third interest due Betty...shall be transferred... to her issue when all or either of them become thirty-five years of age, or to their descendants by blood on the thirty-fifth birthday anniversary of said issue of Betty....

"Should Betty...die before reaching the age of fifty years and without issue, the one-third part ordered paid to her...shall revert to the trust estate and be disbursed as hereinafter provided.

"Should Roger...die before Betty... becomes fifty years of age, the one-third...ordered paid to him...shall be held by the Trustee for the benefit of his issue, and...shall be transferred...to his issue when all or either of them become thirty-five years of age, or to their descendants by blood on the thirty-fifth birthday anniversary of the said issue of Roger....

"Should Roger...die without issue before Betty...becomes fifty years of age, the one-third part... ordered to be paid to him...shall revert to the trust estate and be disbursed as hereinafter provided.

"Should Robin Hood...die before Betty...becomes fifty years of age, the one-third part...ordered to be paid to him...shall be held by the Trustee for the benefit of his issue, and...shall be transferred...to his issue when all or either of them become thirty-five years of age, or to their descendants by blood on the thirty-fifth birthday anniversary of the said issue of Robin Hood....

"Should Robin Hood...die without issue before Betty...becomes fifty years of age, the one-third part...ordered to be paid to him...shall revert to the trust estate and be disbursed as hereinafter provided.

(V) "The expenses and education and maintenance of Roger..., Betty...and Robin Hood..., or their issue, shall be paid out of the trust estate, provided the Trustee is permitted to supervise the expenses....

• • • • •

.....

.....

.....

.....

.....

.....

.....

.....

"...It is the desire of the testator that the beneficiaries shall be educated to the fullest extent of their ambitions and the trust estate shall contribute to their education.

"In the event that Roger..., Betty...and Robin Hood...all die before Betty...reaches the age of fifty years, without issue... the trust estate shall be terminated, and the trust shall be transferred...unto the Shriners' Hospital for Crippled Children...."

The "hereinafter provided" disbursements of the third parts of the named beneficiaries dying without issue, before Betty becomes fifty, can refer only to the provision which directs the payment of "expenses and education and maintenance" of the named beneficiaries or their issue. There is no other provision in the trust to which these parts could refer unless the three grandchildren died before Betty reached age 50, in which event the trust estate, with certain limitations, goes to the Shriners' Hospital, and the trust terminates.

The original complaint was filed by both Betty and Roger III. Afterwards, the latter was withdrawn as a plaintiff and made a defendant. The complaint sought an accounting and reimbursements from the estate under the "expenses" provision. The trustee's counterclaim sought a construction of the trust instrument to determine whether certain provisions were void under the rule against perpetuities, and to determine the obligation of the trustee with respect to the "expenses" provision to Betty and Roger III.

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

.....

An issue was raised with respect to the fitness of the trustee and whether he should be removed. We are not concerned in this opinion with this last issue nor with the issues under the complaint for reasons which will appear hereafter.

The issues made by the pleadings were referred to a master. His pertinent findings were that the provisions of the trust for the issue of Betty, Roger III and Robin Hood were void under the rule against perpetuities, but that the gifts to the named beneficiaries were separable and valid; that the terms "expenses" etc. were not vague, and that payments for "maintenance" needed no approval of the trustee; that one-third of the trust income should be appropriated to the benefit of each named beneficiary, and for any not being educated, the income should be used for maintenance and expenses such as a devoted father would provide. The chancellor sustained exceptions to the master's report and set aside the third article of the will as void. The question here is whether the decree is erroneous.

The chancellor as a basis of the decree, found first that the following provision was void because it violated the rule against perpetuities: "Should Betty die before reaching the age of fifty years...said one-third due Betty shall be transferred to her issue when all or either of them become thirty-five years of age, or to their descendants by blood on the thirty-fifth birthday anniversary of said issue of Betty." That finding included as void also, the similar provisions with respect to Roger III and Robin Hood.

The gifts to Betty, Roger III and Robin Hood, the grandchildren of the testator, are vested interests subject to divestment should they not live until Betty "becomes" 50 years of age. Hoblitt v. Howser, 338 Ill. 328, 331-3; Chapman v. Cheney, 191 Ill. 574, 592. The subsequent provisions of the instant trust confirm this conclusion and for that reason distinguish the decision in Eldred v. Meek, 183 Ill. 26.

The gifts over to the "blood" issue of Betty and the issue of the other grandchildren and to the remoter issue are contingent interests because not directed to ascertained persons. Riddle v. Killian, ³⁶⁶~~336~~ Ill. 294, 302. The chancellor decided that the ultimate gifts over are void under the rule against perpetuities. We think the less remote gifts over to the "blood issue" or "issue" of the grandchildren are void for the same reason. It was possible that when the trust was created that both the ultimate and less remote gifts over would not vest within the lives of Betty, Roger III and Robin Hood respectively, the only relevant lives in being, and 21 years thereafter. Corwin v. Rheims, 390 Ill. 205.

Carlberg v. State Savings Bank, 312 Ill. 181, is not applicable because the distribution of the trust assets in that case necessarily had to take place within the permissive period by the terms of the trust itself. The cases in which gifts to a class have been sustained are distinguished

by the fact that members of the class were in being at the time the trust was established. See O'Hare v. Johnston, 273 Ill. 458; Howe v. Hodge, 152 Ill. 252; The Illinois Land & Loan Company v. Bonner, 75 Ill. 315. Here, none of the named beneficiaries had issue at the time of the establishment of the trust.

It is our opinion that the chancellor erred in deciding that these void contingent gifts over nullified the valid vested interests of Betty, Roger III and Robin Hood. We think that the primary purpose of the testator was provision for these grandchildren and the trust instrument does not disclose the intention of a complete scheme in which the valid gifts depend upon the void ones. Aldendifer v. Wylie, 306 Ill. 426, 434; Beal v. Higgins, 299 Ill. 229, 233; Moroney v. Haas, 277 Ill. 467, 472; Chapman v. Cheney, 191 Ill. 574, 586. This conclusion distinguishes the instant case from such cases as Johnston v. Cosby, 374 Ill. 407, in which valid gifts depended upon void ones; Lawrence v. Smith, 163 Ill. 149, where manifest injustice would have been done the beneficiaries; and Keefer v. McGloy, 344 Ill. 454, where it was held that the testatrix would not have created the trust had she known that its "final" object could not be carried out. We need not consider cases cited in support of the alternative limitation theory to sustain the gifts to the grandchildren, and those cases are not helpful to save the gifts over, to the "blood issue" or "issue" of the grandchildren, which all violate the rule against perpetuities.]

1

2

3

4

5

6

1. The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of life, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that life is a complex of many different parts, and that these parts are all found in the same place, and at the same time. This is a strong argument in favor of the theory of spontaneous generation.

2. The second part of the paper is devoted to a discussion of the problem of the origin of the human race. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human race, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that the human race is a complex of many different parts, and that these parts are all found in the same place, and at the same time. This is a strong argument in favor of the theory of spontaneous generation.

3. The third part of the paper is devoted to a discussion of the problem of the origin of the human mind. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human mind, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that the human mind is a complex of many different parts, and that these parts are all found in the same place, and at the same time. This is a strong argument in favor of the theory of spontaneous generation.

4. The fourth part of the paper is devoted to a discussion of the problem of the origin of the human body. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human body, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that the human body is a complex of many different parts, and that these parts are all found in the same place, and at the same time. This is a strong argument in favor of the theory of spontaneous generation.

5. The fifth part of the paper is devoted to a discussion of the problem of the origin of the human soul. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human soul, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that the human soul is a complex of many different parts, and that these parts are all found in the same place, and at the same time. This is a strong argument in favor of the theory of spontaneous generation.

6. The sixth part of the paper is devoted to a discussion of the problem of the origin of the human spirit. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human spirit, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that the human spirit is a complex of many different parts, and that these parts are all found in the same place, and at the same time. This is a strong argument in favor of the theory of spontaneous generation.

7. The seventh part of the paper is devoted to a discussion of the problem of the origin of the human intelligence. It is shown that the problem is one of the most important and most difficult in the history of science. The author discusses the various theories of the origin of the human intelligence, and shows that the most plausible is the theory of spontaneous generation. This theory is based on the fact that the human intelligence is a complex of many different parts, and that these parts are all found in the same place, and at the same time. This is a strong argument in favor of the theory of spontaneous generation.

The chancellor found the remaining portions of the third article void because of uncertainty in that it is impossible to determine how long payments were to be made if Betty reached fifty years, and Roger III (or Robin Hood) had died theretofore, or if Roger III (or Robin Hood) had died with issue surviving whether payments would continue. Uncertainty was also found as to what was the testator's intent if Betty should die before she reached fifty, and Roger III (or Robin Hood) died with issue between the date of her death and the date of her fiftieth birthday anniversary.

The chancellor construed the terms "with" and "without" issue to mean "with" and "without" issue surviving. He construed the words "age 50" to mean the 50th anniversary of Betty's birthdate. That construction of these terms is not questioned in this court.

If and when Betty attains the age 50, she is to get one-third of the estate and any other named beneficiary surviving at that time is to get one-third of the estate. There is no provision made for any one or more of them getting more than a one-third in that event. Should Betty die before reaching the age 50, the gift to her is defeated, and the gifts to the named beneficiaries are defeated if they die before her 50th birthday anniversary. Should Roger III and Robin Hood die without issue before Betty die, their one-third shares would revert to the trust estate for payments to be disbursed under the "expenses" provision to Betty or her issue until she reached age 50. Should Betty and either Roger III or Robin Hood die without issue before Betty reach age 50,

their one-third shares would revert for disbursement to the survivor "or" his issue. Should Betty die without issue before reaching age 50 and Roger III and Robin Hood survive her, her one-third share would revert to the trust estate for disbursement to Roger III and Robin Hood, or the survivor after Betty's death, "or their issue," if any.

There is nothing in the trust instrument expressly providing a terminal for these payments, but this omission is not fatal to the trust. "[W]here a testator does not specifically indicate the time for which the trust is to continue, his intention must, if possible, be determined from the entire will. Where the evident purpose of the trust is the accomplishment of a particular object, the trust will terminate so soon as that object has been accomplished. . . ." Kohtz v. Eldred, 208 Ill. 60, 72.

The testator was primarily interested in the grandchildren as beneficiaries. We have already decided that the events which divest are the failure of Roger III or Robin Hood to be alive on the 50th anniversary of Betty's birthday, at which time the youngest grandchild, Robin Hood, would be 33 years old. We think that the intention was not that the gifts to the other two should depend on Betty being alive at 50, but that no distribution should be made until Robin Hood was mature enough to use wealth prudently. The date of Betty's 50th birthday if she lives or the 50th anniversary of her birth should she die, is the termination date of the trust unless all three grandchildren die before

that date, in which event the date of the last death would be the termination. The payments under the "expense" provision cease with the termination.

In the event that Betty lives to be 50 years of age without issue and the other two grandchildren die without issue, she gets one-third of the trust estate at her 50th birthday. The other two shares pass to the executor since the trust is terminated and no provision is made for the disposition of those parts. In the interim, until she becomes fifty, the "expense" provision would apply to Betty. Should she have issue under these circumstances, she and the "issue" would be entitled to benefits under that provision until her 50th birthday when the trust would end.

In the event that Betty and either Roger III or Robin Hood lived until Betty's 50th birthday, and the other died without issue before that day, she and the survivor would each get their one-third parts and the remaining third part pass to the executor. Betty, the survivor and their issue, if either or both had issue, would be entitled to the benefits until Betty's 50th birthday.

In the event that Betty die without issue before attaining age 50, the entire trust estate is subject to disbursement under the "expenses" provision to Roger III and Robin Hood, or the survivor, after Betty's death, and to their or his issue, if either or both have issue. The gifts over of the shares to the surviving grandchildren or grandchild being void, the payments would continue until Betty's

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is the question of the origin of the first living organisms. The philosophical aspect is the question of the origin of the universe.

• The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is not only a scientific one, but also a philosophical one. The scientific aspect of the problem is the question of the origin of the first living organisms. The philosophical aspect is the question of the origin of the universe.

The second part of the paper is devoted to a detailed discussion of the scientific aspect of the problem. It is shown that the origin of life is a complex process, which involves the interaction of many factors. The first of these factors is the availability of the necessary chemical elements. The second factor is the presence of a suitable environment. The third factor is the presence of a suitable energy source.

The third part of the paper is devoted to a detailed discussion of the philosophical aspect of the problem. It is shown that the origin of life is a question of ultimate causality. It is a question of whether the origin of life is due to chance, or whether it is due to a pre-existing cause. The question is a philosophical one, because it involves the question of the existence of a first cause.

The fourth part of the paper is devoted to a detailed discussion of the scientific aspect of the problem. It is shown that the origin of life is a complex process, which involves the interaction of many factors. The first of these factors is the availability of the necessary chemical elements. The second factor is the presence of a suitable environment. The third factor is the presence of a suitable energy source.

The fifth part of the paper is devoted to a detailed discussion of the philosophical aspect of the problem. It is shown that the origin of life is a question of ultimate causality. It is a question of whether the origin of life is due to chance, or whether it is due to a pre-existing cause. The question is a philosophical one, because it involves the question of the existence of a first cause.

The sixth part of the paper is devoted to a detailed discussion of the scientific aspect of the problem. It is shown that the origin of life is a complex process, which involves the interaction of many factors. The first of these factors is the availability of the necessary chemical elements. The second factor is the presence of a suitable environment. The third factor is the presence of a suitable energy source.

The seventh part of the paper is devoted to a detailed discussion of the philosophical aspect of the problem. It is shown that the origin of life is a question of ultimate causality. It is a question of whether the origin of life is due to chance, or whether it is due to a pre-existing cause. The question is a philosophical one, because it involves the question of the existence of a first cause.

The eighth part of the paper is devoted to a detailed discussion of the scientific aspect of the problem. It is shown that the origin of life is a complex process, which involves the interaction of many factors. The first of these factors is the availability of the necessary chemical elements. The second factor is the presence of a suitable environment. The third factor is the presence of a suitable energy source.

The ninth part of the paper is devoted to a detailed discussion of the philosophical aspect of the problem. It is shown that the origin of life is a question of ultimate causality. It is a question of whether the origin of life is due to chance, or whether it is due to a pre-existing cause. The question is a philosophical one, because it involves the question of the existence of a first cause.

The tenth part of the paper is devoted to a detailed discussion of the scientific aspect of the problem. It is shown that the origin of life is a complex process, which involves the interaction of many factors. The first of these factors is the availability of the necessary chemical elements. The second factor is the presence of a suitable environment. The third factor is the presence of a suitable energy source.

The eleventh part of the paper is devoted to a detailed discussion of the philosophical aspect of the problem. It is shown that the origin of life is a question of ultimate causality. It is a question of whether the origin of life is due to chance, or whether it is due to a pre-existing cause. The question is a philosophical one, because it involves the question of the existence of a first cause.

The twelfth part of the paper is devoted to a detailed discussion of the scientific aspect of the problem. It is shown that the origin of life is a complex process, which involves the interaction of many factors. The first of these factors is the availability of the necessary chemical elements. The second factor is the presence of a suitable environment. The third factor is the presence of a suitable energy source.

The thirteenth part of the paper is devoted to a detailed discussion of the philosophical aspect of the problem. It is shown that the origin of life is a question of ultimate causality. It is a question of whether the origin of life is due to chance, or whether it is due to a pre-existing cause. The question is a philosophical one, because it involves the question of the existence of a first cause.

50th birthday anniversary at which time the trust would terminate, and third parts be paid over to Roger III and Robin Hood should both be alive or to whichever one is alive, should one have died.

We conclude, therefore, that the chancellor was in error in nullifying the entire trust. We think the void parts should be rejected and the valid parts executed. This construction will carry out the prime intention of the testator, and honor the preferences we think his intention discloses.

Because the chancellor decided the entire trust was void, he did not pass upon the issues of reimbursements and payments under the provisions for "expenses and education and maintenance," of the accounting, and of the removal of the trustee. We have no jurisdiction, though the record may contain all the exhibits and testimony on the issue, to decide these issues in the first instance. Because we lack this original jurisdiction, the cause must be remanded.

In the decree, the chancellor awarded Roger, Jr., as trustee, attorneys fees incurred in the proceedings, to be paid from the trust assets, and at the same time denied Betty allowance from the trust assets for her attorneys fees, and taxed all costs of the suit against her. She claims error in the decree on this point, arguing that this disposition rewards a trustee who attacked the validity of the trust and penalizes those who sought to defend it.

We think that the trust estate is chargeable with the fees and costs of this phase of the suit. The trust instrument needed construction and accordingly the estate should be charged with all costs and fees for the master, and attorneys which can be allocated to the counterclaim. So far as the original suit is concerned, the taxing of the costs and fees already incurred should be deferred until the remaining issues are determined and at that time the entire costs and fees for the original proceeding taxed as the decision then justifies.

For the reasons given, the decree is reversed and the cause remanded with directions to make findings construing the trust instrument in accordance with this opinion, and to determine the remaining issues of the accounting and removal of the trustee in the light of that construction.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS TO MAKE FINDINGS
IN ACCORD WITH THIS OPINION, AND
FOR FURTHER PROCEEDINGS.

LEWE, P.J. AND FEINBERG, J., CONCUR.

the first of these is the fact that the
 the second is the fact that the
 the third is the fact that the
 the fourth is the fact that the
 the fifth is the fact that the
 the sixth is the fact that the
 the seventh is the fact that the
 the eighth is the fact that the
 the ninth is the fact that the
 the tenth is the fact that the
 the eleventh is the fact that the
 the twelfth is the fact that the
 the thirteenth is the fact that the
 the fourteenth is the fact that the
 the fifteenth is the fact that the
 the sixteenth is the fact that the
 the seventeenth is the fact that the
 the eighteenth is the fact that the
 the nineteenth is the fact that the
 the twentieth is the fact that the
 the twenty-first is the fact that the
 the twenty-second is the fact that the
 the twenty-third is the fact that the
 the twenty-fourth is the fact that the
 the twenty-fifth is the fact that the
 the twenty-sixth is the fact that the
 the twenty-seventh is the fact that the
 the twenty-eighth is the fact that the
 the twenty-ninth is the fact that the
 the thirtieth is the fact that the
 the thirty-first is the fact that the
 the thirty-second is the fact that the
 the thirty-third is the fact that the
 the thirty-fourth is the fact that the
 the thirty-fifth is the fact that the
 the thirty-sixth is the fact that the
 the thirty-seventh is the fact that the
 the thirty-eighth is the fact that the
 the thirty-ninth is the fact that the
 the fortieth is the fact that the
 the forty-first is the fact that the
 the forty-second is the fact that the
 the forty-third is the fact that the
 the forty-fourth is the fact that the
 the forty-fifth is the fact that the
 the forty-sixth is the fact that the
 the forty-seventh is the fact that the
 the forty-eighth is the fact that the
 the forty-ninth is the fact that the
 the fiftieth is the fact that the
 the fifty-first is the fact that the
 the fifty-second is the fact that the
 the fifty-third is the fact that the
 the fifty-fourth is the fact that the
 the fifty-fifth is the fact that the
 the fifty-sixth is the fact that the
 the fifty-seventh is the fact that the
 the fifty-eighth is the fact that the
 the fifty-ninth is the fact that the
 the sixtieth is the fact that the
 the sixty-first is the fact that the
 the sixty-second is the fact that the
 the sixty-third is the fact that the
 the sixty-fourth is the fact that the
 the sixty-fifth is the fact that the
 the sixty-sixth is the fact that the
 the sixty-seventh is the fact that the
 the sixty-eighth is the fact that the
 the sixty-ninth is the fact that the
 the seventieth is the fact that the
 the seventy-first is the fact that the
 the seventy-second is the fact that the
 the seventy-third is the fact that the
 the seventy-fourth is the fact that the
 the seventy-fifth is the fact that the
 the seventy-sixth is the fact that the
 the seventy-seventh is the fact that the
 the seventy-eighth is the fact that the
 the seventy-ninth is the fact that the
 the eightieth is the fact that the
 the eighty-first is the fact that the
 the eighty-second is the fact that the
 the eighty-third is the fact that the
 the eighty-fourth is the fact that the
 the eighty-fifth is the fact that the
 the eighty-sixth is the fact that the
 the eighty-seventh is the fact that the
 the eighty-eighth is the fact that the
 the eighty-ninth is the fact that the
 the ninetieth is the fact that the
 the ninety-first is the fact that the
 the ninety-second is the fact that the
 the ninety-third is the fact that the
 the ninety-fourth is the fact that the
 the ninety-fifth is the fact that the
 the ninety-sixth is the fact that the
 the ninety-seventh is the fact that the
 the ninety-eighth is the fact that the
 the ninety-ninth is the fact that the
 the hundredth is the fact that the

9837
STATE OF ILLINOIS

348 I.A. 221
1

APPELLATE COURT

AT AN APPELLATE COURT, for the ^{Third} ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HARRY E. WHEAT, Presiding Judge

HONORABLE CHARLES A. O'CONNOR, Judge

HONORABLE C. ROSS REYNOLDS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of NOVEMBER A. D. 19 52, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

**John F. Garner, Plaintiff-Appellee, vs. Ruth Schmiedeskamp,
Defendant-Appellant.**

General No. 9837

MR. PRESIDING JUSTICE WHEAT delivered the opinion of the Court.

This is an ejectment action brought by plaintiff-appellee John F. Garner against defendant-appellant Ruth Schmiedeskamp for possession of residential premises in Quincy, Illinois. Upon jury verdict favorable to plaintiff the trial court entered judgment for the plaintiff and this appeal follows.

From the pleadings it appears that since 1936 the premises were occupied by Carl Schmiedeskamp, his wife, Ruth Schmiedeskamp (the defendant), her two children and her mother, on a month to month tenancy. The rent to October 3, 1950, was paid monthly by Carl Schmiedeskamp, at which date he moved from the premises. The plaintiff landlord thereafter refused to accept the monthly rental from the defendant, and on July 12, 1951, filed his complaint in ejectment. This complaint is in the usual form and no question is raised as to its legal sufficiency. On August 6, 1951, defendant filed her verified motion to dismiss the complaint setting forth: (1) The Court does not have jurisdiction as plaintiff failed to obtain a certificate of eviction from the office of the Housing Expediter as required by the Federal Housing and Rent Act of 1947 as amended. (2) That the defendant, her husband and two children and defendant's mother had been occupying the premises for approximately twenty years as a family unit. (3) That during such twenty year period up to October 3, 1950, Carl Schmiedeskamp paid the monthly rental which was accepted by the plaintiff with the knowledge that such premises were occupied by Ruth Schmiedeskamp, the wife, her two sons and her mother. (4) That since October 3, 1950, Ruth Schmiedeskamp has tendered to plaintiff the agreed rental of \$55.00 a month with funds furnished to her by her husband, Carl, and that plaintiff has refused to accept said tendered rental. This motion was denied. Thereafter on August 10, 1951, defendant filed an answer containing substantially the

same subject matter as the prior motion, which answer was substantially stricken by the Court on September 20, 1951. On October 5, 1951, defendant filed her amended answer containing substantially the same allegations as her prior motion with other matters with which this Court is not now concerned. This amended answer was likewise stricken by the Court.

It appears undisputed from the pleadings that these premises in Quincy, Illinois, were subject to the provisions of the Housing and Rent Law of 1947 as amended. Section 1, Paragraph 825.6 of this law provides substantially that so long as the tenant continues to pay rent to the landlord, such tenant shall not be removed by action to evict or to recover possession unless the landlord has obtained a certificate in accordance with such regulations. Paragraph 825.1 of said Section 1 of such Act defines a tenant not only so as to include a sub-tenant lessee or sub-lessee but also "or other person entitled to the possession or to the use or occupancy of any housing accommodation". Therefore, the controlling question in this case is as to whether or not defendant is entitled to the use or occupancy of the premises, which in turn requires a determination as to whether or not the premises were rented to the family as a family unit.

The plaintiff relies chiefly upon the case of *Harker v. Levy*, 322 Ill. App. 677 in support of his position on the principal issue which we have above outlined. In that case the husband had a written lease for a year. Prior to the expiration of the year the landlord tendered to him a renewal of the lease for one year, which tender was refused and the husband left the premises. The wife offered to renew the lease in her name which offer was rejected by the landlord. The Court, in finding the issues in favor of the landlord stated as follows: "There was no contract between plaintiff and Mrs. Levy covering the premises. Any right she had in the premises was derived from her husband, Dr. Levy. When his right under the lease was extinguished by his refusal of the new lease * * * whatever right Mrs. Levy had was extinguished." The so-called housing law which was then in effect and which has since been repealed provided under Section 6 (a-1) that a tenant could be evicted if he refused to execute a written extension of his lease.

Such is not a provision of the present housing law. The defendant, insofar as Illinois cases are cited, refers to the case of *Liberty Nat. Bank v. Zimmerman*, 333 Ill. App. 94. This case is pertinent chiefly because of its determination as to what constitutes a family. Without excessive quotation, the family is substantially found to be a collective body of persons who may live in one house, including parents, children or groups of persons closely related by blood.

It is the opinion of this Court that it was a prerequisite to plaintiff's suit that he obtain a certificate authorizing his suit under the Federal Housing and Rent Act and that regardless of this the trial court was in error in striking the motion of defendant and her several answers which set up that for a long period of time plaintiff had rented to Carl Schmiedeskamp and his family these premises with full knowledge as to the number of individuals who made up such family. This is a matter which, if successfully proved on the trial by defendant, would have been a bar to plaintiff's action.

The judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

9842
STATE OF ILLINOIS

348 I.A. 221
2

APPELLATE COURT

AT AN APPELLATE COURT, for the ^{Third}~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HARRY E. WHEAT, _____ Presiding Judge

HONORABLE CHARLES A. O'CONNOR, _____ Judge

HONORABLE C. ROSS REYNOLDS, _____ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of NOVEMBER A. D. 1952, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

Walter Thiede and Edwin Johnson, doing business as Thiede & Johnson, Plaintiffs-Appellees, vs. Tractor & Equipment Company, a corporation, Defendant-Appellant.

General No. 9842

MR. PRESIDING JUSTICE WHEAT delivered the opinion of the Court.

This is an action by plaintiffs-appellees Walter Thiede and Edwin Johnson doing business as Thiede & Johnson, against defendant-appellant Tractor & Equipment Company, a corporation, for damages arising out of a transaction involving the rental of certain machinery. The jury returned a verdict in favor of plaintiffs, motion for judgment notwithstanding the verdict was denied, motion in arrest of judgment was denied and motion for new trial was denied. Judgment was entered on the verdict in the sum of \$6,500.00 and costs, from which this appeal is taken.

Plaintiffs rented from defendant by written contract certain machinery to be used in their business of quarrying and selling limestone. Upon attempting to use such machinery, plaintiffs charged that it was mechanically incapable of performing the desired work. They further contend that thereafter defendant made oral promises and agreements as to such machinery which were never complied with and therefor bring this action, not on the written contract, but upon such subsequent alleged oral agreements, and by a second count, in tort.

Count 1 of the amended complaint substantially charged that plaintiffs were engaged in the business of quarrying and selling limestone with their principal place of business and limestone pit located in Logan County, Illinois; that on November 1, 1947, plaintiffs and defendant entered into a written lease of machinery, a copy of same being attached to the complaint as exhibit "A" and made a part thereof. By the terms of this lease defendant leased to plaintiffs a Link Belt Dragline and Dragline Bucket for a period of thirty days with certain renewal provisions, at a rental of \$800.00 per month payable in advance with the loading, freight and delivery charges to be added to the first rental payment, said machinery to be used in Logan County; that plaintiffs paid to defendant the sum of \$1,000.00 at the time of the ex-

execution of the lease to cover the first month's rental and the loading, freight and delivery charges; that on November 6, 1947, plaintiffs received said machinery at their limestone pit in Logan County; that upon attempting to use said machinery plaintiffs found that it was not in good running and mechanical order and that it would not operate and function as a Link Belt Dragline and Bucket; that such machinery would not scoop up rock from the quarry and would not propel itself up a forty-five degree incline or any incline; that thereafter plaintiffs notified defendant of such failure, whereupon defendant came to Logan County and attempted to fix such machinery; that subsequent to November 6, 1947, defendant by its agents, servants and employees did on numerous occasions over a period of time in excess of thirty days, come to Logan County and attempt to fix such machinery so that it would properly operate; that during said time defendant did on numerous occasions state and promise the plaintiffs that it could and would fix the machinery so that it would scoop up rock from the quarry and would propel itself up the incline in the quarry, which was less than a forty-five degree incline; that in consideration of such promises the plaintiffs agreed to keep said machinery if it would and could be fixed as agreed upon and that they would keep it and use it for a period in excess of thirty days; that although the defendant worked on such machinery on numerous occasions, the same was never put in good running and mechanical order, would never operate and function as a Link Belt Dragline and Bucket, would never scoop up rock from the quarry and would never propel itself up the quarry incline; that plaintiffs relied upon the aforesaid agreements and promises made subsequent to the execution of exhibit "A" and did not attempt to secure other suitable machinery; that the quarrying and sale of limestone is a seasonal business and that the months of November and December are busy months; that seven weeks elapsed while defendant was trying to get such machinery in operating condition and before plaintiffs could secure other equipment that would properly operate; that as a result of the breaches of the agreements made by the defendant as aforesaid the plaintiffs were unable to quarry and sell limestone during the seven week pe-

riod commencing November 6, 1947, and as a result have lost profits from sales of limestone, have lost customers and have otherwise been damaged in their business in the sum of \$7,000.00; that defendant also owes plaintiffs the sum of \$1,000.00 paid by plaintiffs at the time of the execution of said lease.

Count 2 of said amended complaint was basically the same as Count 1 except that it was in tort charging that the defendant knew, or in the exercise of reasonable care should have known, that the machinery could not be repaired so that it would operate properly, yet the defendant negligently failed to disclose to plaintiffs that said machinery was in such a condition so that it could not be repaired, but on the contrary told the plaintiffs and by acts and deeds led plaintiffs to believe that the machinery could be so repaired. By answer the defendant denied that the plaintiffs relied on any statements or promises made subsequent to the execution of the written lease and denied that there were any such oral statements or promises made, denied that it ever promised or warranted that the machinery would operate in any manner or for the purpose or use desired by plaintiffs; alleged that plaintiffs' claim for \$1,000.00 as set forth in the complaint was adjudicated in a Cook County Circuit Court action wherein defendant was plaintiff and plaintiffs were defendants and further alleged that credit was given to Thiede & Johnson for such claim of \$1,000.00 in said suit. The answer further alleged that during all of the times involved the contract, exhibit "A", was in full force and effect and was so adjudicated by the Circuit Court of Cook County, Illinois, in said suit above referred to; that said exhibit "A" provided in part as follows:

"It is expressly understood and agreed that this lease contains the entire agreement between the Lessor and Lessee and that no agreements or representations, either verbal or written, made by agents or employees, shall be binding on the Lessor other than those contained herein.

The Lessee hereby acknowledges that said Lessee has inspected the above described machinery and that the same is in good running and mechanical order and the Lessee undertakes to make all repairs necessary during the lease period or any extension

thereof. The Lessor does not warrant any of the machinery covered by this lease and does not warrant that the machinery covered by this lease is suitable or adaptable for the use that the Lessee may intend to make of said machinery.

As a part of the consideration of this lease, the Lessee agrees that the Lessor shall not be liable to the Lessee for any claim of any nature whatever resulting from the use or condition of the machinery hereby leased."

by reason of which plaintiffs are not entitled to recover anything from defendant resulting from the use or condition of said machinery; that there was no consideration on the part of plaintiffs to defendant for any alleged oral agreements between the parties.

Plaintiff Johnson testified that his regular trade was that of a welder and machinist; that just prior to the execution of the contract, exhibit "A," he was in Chicago at the place of business of defendant; that he told defendant's agent Woltman the physical situation surrounding the quarry, the type of machine he desired and referred to a fifteen degree hill; that Mr. Woltman said the machine would go up a forty-five degree incline; that when he looked at the machine it was propelled about ten feet forward and then backed up the same distance. The machine consisted of a crane with a boom which operated a Drag Bucket by means of a cable and was powered by a gasoline motor operating on Caterpillar tracks. Defendant was paid \$1,000.00 and the contract executed. The machinery was delivered November 6th. The next morning the machine crossed a level field a distance of a quarter of a mile and then would go no further; the bearings went out of it and it started to hammer. Defendant was notified and the next morning sent a repair man to the quarry. The bearing was replaced and the repair man said the machine was ready to go. After moving another quarter of a mile the bearings went out again. When they attempted to move the machine up on the quarry pile one of the Caterpillar tracks came off. Defendant was again phoned and again sent a service man on November 12th. His name was Max Berger. Berger attempted to get the machine up the incline to the top of the pile but succeeded in getting it only two-thirds of the way up by reason of

the lack of power. The machine was backed down and again the tracks came off. Defendant's agent Woltman came down November 15th when the bearing went out again and sent out a mechanic on November 18th, who overhauled the motor on the 19th and 20th. The motor was taken apart, the valves ground and new bearings installed. Thereafter plaintiffs attempted to use the machine but it had insufficient power and would not raise the Bucket over six or eight feet, at which time the motor would die. Plaintiffs never got the Dragline up to its proper place of operation. Both Caterpillar tracks came off at once. The machine weighed about forty-two tons. Defendant's agent, Max Berger, came down November 23rd and the tracks were replaced but again came off while Berger was present. The sprockets operating the tracks were worn out. The machine could not be gotten up the hill. On December 6th Max Berger and one Max Bren reported. They adjusted the motor and put the tracks on the machine again. Plaintiffs employed a crane operator, one Joe Carr, who was there about December 11th or 12th and the machine failed to operate satisfactorily. The machine was pushed out of the way and thereafter never used; that when Woltman was there on November 17th and 18th he said that the defendant would make the machine work all right and not to worry about the rent as no rental would be charged until the machine was in perfect working condition. On December 19th plaintiffs wrote a letter to defendant stating that the machine would not operate, requesting that it be removed from the location in Logan County, requesting a settlement as to the matter and demanding the return of the \$1,000.00 payment. Plaintiffs' witness Joe Carr testified that he had worked on cranes and heavy machinery for about sixteen years prior to his becoming a crane operator; that in November he was employed by plaintiffs to operate the crane but that the engine was defective and had no power; that if the Bucket were loaded the engine would die. He saw Max Berger working on the machine at one time. The Caterpillar tracks were completely worn out and as soon as the machine was in motion the tracks came off. He worked about two weeks attempting to operate the machine but spent most of his time putting the tracks on. Whenever the machine moved about four

feet the tracks would again come off. In his efforts to use this machinery he found that it would not work. Plaintiffs' witness Fred Holmes testified that he was a garage man and heavy construction contractor and had been engaged in the use of heavy machinery about twelve years, had used various types of Dragline; that in November or December of 1947 he inspected the machinery in question. The machine was not in good operating condition, it was off of the tracks, the motor would not run right, the machine was not in operating condition. Plaintiff Edwin Johnson, recalled, testified that prior to November, 1947, with the equipment they then had, plaintiffs produced an average of one hundred fifty tons of limestone a day. There was a big demand for the limestone and it was sold to truckers for \$2.00 a ton. A ten cent per ton royalty was paid to the owner of the quarry. Four men were employed by plaintiffs and were paid at the rate of \$1.50 per hour. \$16.00 was spent for repairing a wheel and two belts were purchased for \$17.00 and the cost of gas and oil consumed was twenty cents per ton. The proceeds from the sale of the limestone were deposited in the State Bank of Cornland.

Plaintiff Walter Thiede testified that on November 1, 1947, plaintiffs told defendant's agent Woltman the conditions under which they had to operate in their quarrying business and left it to defendant's judgment as to what machinery they would suggest. Woltman said the machine would go up a forty-five degree slope; that the crane was in operating condition. His testimony as to attempts to operate the machine was substantially the same as the plaintiff Johnson and likewise as to the conversation which the plaintiffs had with Woltman. Plaintiffs attempted to obtain another Dragline but were unable to locate one; that they thereafter used a bulldozer in their operations. Morris Leff testified that he was secretary of defendant company in 1947; that Frederick H. Woltman in 1947 was salesman and vice-president of defendant company. Woltman testified likewise that in 1947 he was salesman and vice-president. He went to the quarry in 1947 to look at the machine which was causing trouble, which was about November 15th, 1947. He denied that he had ever made any statement as to what incline the machine would ascend. Follow-

ing November 1, 1947, to December 19, 1947, it was brought to his attention that the machinery was not operating and the defendant did not, at any time, offer or attempt to replace the machine with another. The machine was fifteen to twenty years old.

On behalf of the defendant, Morris Leff testified that he was present November 1st prior to the execution of exhibit "A"; that plaintiffs were told by Woltman that in quarry operations a shovel was more frequently used and would be more advantageous as well as cheaper. Plaintiff Johnson stated that a Dragline would be able to do the job. Both of plaintiffs, after inspecting the machine, reported that it worked. No bills were sent to plaintiffs for any repairs on the machine after November 1, 1947 and defendant paid the freight for the return of the machine to Chicago; that a few days or a week after plaintiffs received the machine he received a call from them that it would not work. The letter written by plaintiffs under date of December 19th was received by defendant. Witness Max Berger testified that as a heavy duty mechanic he had been employed by defendant for ten years as shop foreman. He had operated a crane for about eight years and had been a mechanic for twenty-five years. On November 1, 1947, he had a conversation with plaintiffs in connection with the demonstration of the machine. Before the machine was shipped he found it in running condition. He next saw it in Logan County about November 8th or 9th, at which time it was in good running condition. He operated the machine up the incline although with difficulty because of mud. On November 22nd or 23rd he again examined the machine and found it in running condition. He operated it and ran it down into the quarry. He again saw the machine in the first week of December in the presence of defendant's agent Max Bren. One track was off the machine and the sprockets were filled with mud and small pieces of limestone. This was the cause of the tracks dropping off and the same thing would happen to a new machine. In the fall of 1947 there were a number of other companies in Chicago in the business of leasing this type of machinery.

It is urged as error that defendant was entitled to a directed verdict at the close of the evidence and for a judgment in its favor notwithstanding the verdict

all because of the terms of the written lease and by virtue of the judgment of the Circuit Court of Cook County. It appears that on February 24, 1948, defendant obtained a judgment by confession in the Circuit Court of Cook County, Illinois, under a clause in the written contract. This judgment was for \$2,392.50 representing the balance of four months' rent from November 1, 1947, to February 28, 1948, plus attorneys' fees. On December 2, 1948, plaintiffs moved to vacate this judgment which motion was denied as being too late. This judgment was not a bar to the suit in Logan County as the issues in the instant case, that is the matters of subsequent oral agreements and the tort liability, were never before the Cook County Court. In the case of *Standard Oil Co. v. Burkhartsmeier Coop. Co.*, 333 Ill. App. 338, it is said that it is absolutely necessary that in order that a former judgment order operate as an estoppel by verdict that there shall have been a finding of a specific fact in such former judgment and that is material and controlling in that case and also material and controlling in the pending case. It must also conclusively appear that the matter of fact was so in issue that it was necessarily determined by the Court rendering the judgment interposed as a bar by reason of such estoppel. If there is any uncertainty on this point the estoppel will not be applied for the reason that the Court may have decided it upon one of the other issues of fact. The specific fact found in the Cook County suit was based upon the amount of rent under the written lease. This finding was not controlling as to whether or not there was a subsequent oral agreement or whether such subsequent oral agreement was breached and likewise there was no finding in the Cook County proceeding as to the liability of the defendant for tort. As to whether or not defendant was entitled to judgment by virtue of the terms of the written lease it is argued that the lease provided that it contained the entire agreement between the parties and that no agreements, verbal or written, shall be binding on the lessor other than those contained in the lease. Another clause stated that the lessee acknowledged that he inspected the machinery and found the same to be in good running and mechanical order and that the lessee undertakes to make all repairs necessary

during the term of the lease. By another clause it is provided that the lessor does not warrant the machinery and does not warrant that it is suitable or adaptable for the use that the lessees may intend to make of such machinery. Another clause provides that the lessor shall not be liable for any claim of any nature whatsoever resulting from the use or condition of the machinery leased. By virtue of these provisions defendant argues that plaintiffs are not entitled to judgment.

It must be determined whether the terms of a written lease apply to the issues in this case or whether it is possible for a later express contract made subsequent to the written lease to abrogate the provisions in writing. Defendant argues that there cannot be an express and an implied contract covering the same subject matter existing at the same time. It does not appear that the question of an implied contract is here involved. Rather it appears to be a question as to whether there was a valid, expressed contract entered into orally after the written lease was executed, which is to govern the issues of this case. It was a question of fact for the jury as to whether there was a subsequent oral agreement to the effect that defendant would put the machinery in proper running operation and would charge no rental for its use in the meantime. The jury found that there was such an agreement. There was evidence to support a finding that there was consideration to support this oral agreement. The benefit to defendant consisted in the possible earning of future rentals if the machine could be made to operate and a possible sale to plaintiffs. Detriment was suffered by plaintiffs in loss of profits by reason of the failure of the machine to operate. In the case of *Becker v. Morstadt*, 381 Ill., 422, there was a written lease under seal executed by the parties. Subsequently there was an oral agreement whereby the lessor waived the provision in the written lease that improvements made by lessee should not be removed from the premises at the end of the term. The Court held that the subsequent parol agreement waived the performance of the provision not to remove the improvements. The Court stated, "Originally there was a written lease executed by the parties. This lease was under seal. As a general rule an

executory contract under seal cannot be altered, changed or modified by parol. * * * It is also the rule that while a parol contract which adds to, or modifies, the terms of an executory written contract under seal must be held nugatory, nevertheless the parties to the contract may, by parol agreement, waive the performance of certain covenants contained in the contract, and when that is done, such provisions are abrogated. * * * This rule is based on the doctrine of equitable estoppel. It is applied where one of the parties to the contract has been induced by the parol agreement to adopt a line of conduct which is prejudicial to his interest if strict performance of the written covenant is insisted upon. For this reason it is not necessary that there be a new consideration to support the parol agreement whereby the performance of the written covenant is waived". It is the opinion of the Court that defendant was not entitled to a judgment by virtue of the terms of the written lease nor by reason of the judgment of the Circuit Court of Cook County. It is also contended that although defendant argues that as the written lease provides that the lessor shall not be liable for any claim of any nature resulting from the use or condition of the machinery hereby leased, that there is also a tort count in the amended complaint. Whether the jury's verdict was based upon the tort action or upon the action on the subsequent parol agreement, this Court has no way of knowing. In any event, the release contained in the written lease would not be effective as a release from liability in a tort action, for the tort was committed subsequent to the date of the written lease.

Other assignments of error relate to the ruling of the Court in the giving and refusing of certain instructions. This Court believes that taken as a series, the jury was fully and fairly instructed and that no reversible error was committed. It is also argued that plaintiffs failed to mitigate damages. We believe the evidence would justify a finding that plaintiffs relied upon the oral agreement that the machine would be placed in proper working order and there was no occasion for plaintiffs to acquire other machinery during the period the parties were negotiating as to the operation of the machine. (Although it does appear

that in the latter part of December, 1947, plaintiffs rented a bulldozer and a tractor and went ahead with operations as best they could). As to whether plaintiffs should have used "floats" in the operation of the machine, this again was a question of fact for the jury, who apparently decided that such use was unnecessary. It is further argued that the Court admitted improper evidence as to transactions prior to the execution of the written contract, conversations in direct contradiction of the terms of the written contract, evidence as to bank deposits, the letter of plaintiffs' dated December 19 and plaintiffs' lease of the land on which the quarry was located. We believe that no prejudicial or reversible error was committed by the Court in its rulings in this regard. It is urged with some merit, that the verdict is excessive. The proof as to damages is, as to some elements, vague and inconclusive. It would appear that a verdict of \$4,000.00 would have been ample and would have been within the realm of the reasonable proof.

This case was strenuously contested and in such a trial it is impossible to obtain a record free from error of any kind. However, from a full review of the entire case, this Court is of the opinion that the parties had a fair and impartial trial and that the issues were fully presented to the jury under proper instructions. It is the judgment of this Court that the judgment of the Circuit Court be affirmed, provided that plaintiffs file remittitur of \$2,500.00 (so as to reduce the judgment to \$4,000.00) within 30 days, otherwise the cause is reversed and remanded.

JUDGMENT AFFIRMED UPON REMITTITUR
OF \$2,500.00 TO BE FILED WITHIN 30
DAYS, OTHERWISE CAUSE REVERSED AND
REMANDED.

Remittitur filed November 24, 1952.

9848
STATE OF ILLINOIS

348 I.A. 222

APPELLATE COURT

AT AN APPELLATE COURT, for the ^{Third}~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HARRY E. WHEAT, _____ Presiding Judge

HONORABLE CHARLES A. O'CONNOR, _____ Judge

HONORABLE C. ROSS REYNOLDS, _____ Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of NOVEMBER A. D. 1952, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

Blanche Pennington Bidle, Plaintiff-Appellant, vs. Richard Ellis Bidle, Defendant-Appellee.

General No. 9848

MR. PRESIDING JUSTICE WHEAT delivered the opinion of the Court.

This is an appeal from an order which modified a divorce decree by striking therefrom a provision for alimony payments in the sum of \$75.00 per month.

On July 24, 1951, plaintiff-appellant Blanche Pennington Bidle, obtained an uncontested divorce from her husband, defendant-appellee Richard Ellis Bidle, the latter having entered his appearance. An agreed property settlement was approved by the Court and it may well be assumed that the terms of the decree as to alimony, to-wit: \$75.00 per month, were mutually satisfactory, as no appeal was taken and the payments were made. No children were born of the marriage. On October 31, 1951, defendant filed a verified petition to modify the decree setting forth that the circumstances of the plaintiff had changed materially since the entry of the decree in that plaintiff was then unemployed but was now gainfully employed earning annually in excess of \$3,000.00 and that plaintiff had recently received from the estate of her father a sum in excess of \$13,000.00. Upon hearing, the Court entered an order November 6, 1951, striking the provision for the payment of \$75.00 per month alimony, from which this appeal is taken.

In the case of *Joslyn v. Joslyn*, 315 Ill. App., 160 at 177, the opinion states: "As no motion was made to modify the decree within thirty days after its rendition the trial court was powerless to change the provisions in the decree as to alimony unless by agreement of the parties or unless plaintiff filed a petition setting up that there had been a change in the conditions of the parties subsequent to the entry of the decretal order." This rule was also enunciated in *Darmer v. Darmer*, 324 Ill. App., 160, and *White v. White*, 312 Ill. App., 383.

Upon hearing, the evidence disclosed that at the time the decree was entered plaintiff was a school teacher receiving an annual salary of \$2,880.00 payable in twelve monthly installments. At the time of the hear-

ing on the petition for modification her salary as such teacher had been increased \$60.00 per year with a cost of living bonus of \$200.00. It also appeared that plaintiff received the sum of \$16,700.00 from the estate of her father, but at the date of entry of the divorce decree defendant knew she had received this or was about to receive it, so that this is not a factor to be considered relative to a change in the financial condition of plaintiff. It further appears that this sum was to be an "educational fund" for the education of her two children by a previous marriage, a daughter being in college and a son in his last year in high school. It thus appears that defendant petitioner obtained a hearing upon his sworn petition that plaintiff was unemployed at the time of the entry of the divorce decree and that she had since received a bequest from her father's estate, both of which allegations were obviously known by him to be false, that is, he knew she was on July 24, 1951, receiving a salary as a teacher and knew that as of July 24, 1951, she either had received or was about to receive such bequest. He acquiesced as to the alimony provision of the decree by failing to appeal therefrom and by making the payments, with full knowledge of the financial situation of plaintiff. He has shown no change in his ability to pay and has shown only that plaintiff is to receive a trifling \$60.00 more for the current year, plus a cost of living bonus in the sum of \$200.00. Under such showing, under the principle announced above, the trial court erred in vacating the provision as to alimony.

The cause is reversed and remanded with directions to modify the decree of July 24, 1951, in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

9844
STATE OF ILLINOIS

348 I.A. 223
1

APPELLATE COURT

AT AN APPELLATE COURT, for the ^{Third}~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HARRY E. WHEAT, Presiding Judge

HONORABLE CHARLES A. O'CONNOR, Judge

HONORABLE C. ROSS REYNOLDS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of NOVEMBER A. D. 1952, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

**People of the State of Illinois, Plaintiff-Defendant in Error,
vs. Fay Cumby, Defendant-Plaintiff in Error.**

General No. 9844

MR. JUSTICE O'CONNOR delivered the opinion of the Court.

This is a Writ of Error to the County Court of Sangamon County testing the sufficiency of an information filed by the State charging the plaintiff in error, Fay Cumby, with contributing to the delinquency of a minor. The case was tried without a jury. Upon being found guilty she was sentenced to the Illinois State Reformatory for Women for one year.

The question of the sufficiency of the evidence is raised in the Motion in Arrest of Judgment, but not included in the Assignment of Errors in this appeal. No report of proceedings is filed in this court, and therefore the sufficiency of the evidence cannot be inquired into here.

The information charges in Count One that plaintiff in error did "unlawfully and wilfully encourage one Mary Elizabeth Cumby, a female person under the age of eighteen (18) years, to-wit thirteen (13) years, to become a delinquent person, and did then and there unlawfully, wilfully, and knowingly do acts which directly produced, promoted and contributed to conditions to render the said Mary Elizabeth Cumby to become a delinquent child, in that she, the said Fay Cumby, unlawfully, knowingly and wilfully encouraged the said Mary Elizabeth Cumby to have sexual relations with one James Will Skaggs, the said James Will Skaggs, then and there being a male person above the age of seventeen (17) years."

And in Count Two the information alleges that plaintiff in error did "unlawfully and wilfully encourage one Mary Elizabeth Cumby, a female person under the age of eighteen (18) years, to-wit: thirteen (13) years, to become a delinquent person, and did then and there unlawfully, wilfully, and knowingly do acts which directly produced, promoted, and contributed to conditions to render the said Mary Elizabeth Cumby to become a delinquent child, in that the said Fay Cumby did knowingly, unlawfully, and wilfully encourage the said Mary Elizabeth Cumby to live in

a state of fornication with one James Will Skaggs."

An examination of the authorities offered by the plaintiff in error fails to disclose them sufficiently in point to justify the extension of this opinion for the purpose of distinguishing or discussing the cases. Most of the citations deal with the sufficiency of the evidence in the particular case. With no report of proceedings filed here the evidence is not being considered.

This information not only sufficiently follows the statute, but also alleges specific acts which show a violation. Only a guilty verdict, such as was returned, could follow proof of the facts alleged. The information is sufficient.

It is further urged that the affidavit attached to the information is insufficient. The plaintiff in error fails to point out in what particular regard this is true. A reading of the authorities cited fails to reveal any defect. It is signed and sworn to by one who acknowledged that he knew the contents of the information and that the statements therein contained were true. The acknowledgment was proper.

The judgment of the County Court of Sangamon County should be affirmed.

AFFIRMED.

9850
STATE OF ILLINOIS

348 I.A.223
2

APPELLATE COURT

AT AN APPELLATE COURT, for the ^{Third}~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HARRY E. WHEAT, Presiding Judge

HONORABLE CHARLES A. O'CONNOR, Judge

HONORABLE C. ROSS REYNOLDS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of NOVEMBER A. D. 1952, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

In the Matter of the Estate of Philip Reab, deceased. Petition of Lola Reab for Admission to Probate of Codicil to Will.

Lola Reab, Plaintiff-Appellant, vs. The Millikin Trust Company, as Administrator with the Will Annexed of the Estate of Philip Reab, deceased, and Hattie Siefert, Defendants-Appellees.

General No. 9850

MR. JUSTICE O'CONNOR delivered the opinion of the Court.

On May 31, 1929 Philip Reab executed his last Will and Testament as follows:

“ LAST WILL AND TESTAMENT

* * * * *

I, Philip Reab of the City of Decatur, County of Macon and State of Illinois, being of sound and disposing mind and memory, do hereby make, publish and declare this to be my last will and testament, hereby revoking any and all other wills by me at any time heretofore made and executed.

1. I hereby order and direct my executor hereafter named to pay out of my estate all of my just debts and funeral expenses as soon after my decease as may be convenient.

2. I hereby give, bequeath and devise unto Guy P. Lewis all of my property, real, personal and mixed, in trust, however, for the following uses and purposes: All of said property shall be converted into cash as soon after my death as may be conveniently done and all such money shall be divided as follows: To my sister, Eliza Reab, one-half; To my brother Charles Reab, one-fourth; and to my sister, Hattie Siefert, one-fourth, to be their sole and absolute property forever.

3. I hereby nominate and appoint my friend, Guy P. Lewis, Executor of this my last will and testament.

IN WITNESS WHEREOF I have hereunto sub-

scribed my name and affixed my seal this 31st day of May, A.D. 1929.

(sgd) PHILIP REAB (SEAL)

The above written instrument was subscribed by the said Philip Reab in our presence and acknowledged by him to each of us and he at the same time declared the above instrument so subscribed to be his last will and testament and we, at his request, in his presence and in the presence of each other have signed our names as witnesses hereto on the day and year last above written.

(sgd)

MELBA GENDERKE residing at Decatur, Ill.
FLORENCE SCHIMANSKI residing at Decatur, Ill.
LAWRENCE C. WHEAT residing at Decatur, Ill.

PHILIP REAB''

He was a bachelor. Some time prior to 1947 his sister Eliza and his brother Charles died. In the latter part of 1947 he went to live with Fannie Reab, the widow of his brother Charles, and Lola Reab, their only child.

On July 1, 1948, Philip Reab asked five persons who were visiting at the home if they would sign an "agreement" or "paper" between "him and Lola" or between "himself and Fannie and Lola." They replied that they would and he signed and Fannie and Lola signed, and it was signed by all of the witnesses. The instrument is as follows:

"This agreement made on first day of July 1948 between Philip Reab of Niantic, county of Macon, State of Ill. and Fannie Reab of Niantic, county of Macon, State of Ill. can collect from my estate after my death for care, room, board and laundry, \$7.00 a day from Nov. 8, 1947 to date of my death. Lola Reab can collect for my care, \$3.00 a day from Nov. 8, 1947 to date of my death.

Labor done on my properties can be collected for by Fannie Reab and Lola Reab from Dec. 13, 1938 to date of my death, \$1.00 hour. They can collect for labor done by Chas. Reab on my properties from July 30, 1938 to Oct. 5, 1943, \$1.00 hour. Bills of

materials for improvements on farm can be collected.

Lola Reab can collect \$100.00 a year for management of my farm, Niantic, county of Macon, State of Ill. from Jan. 1, 1943 until my estate is settled, she can manage farm land until my estate is settled. Fannie Reab and Lola Reab can have all money from corn and beans that comes off of my farm at Niantic, county of Macon, State of Ill. at my death until my (Philip Reab) estate is settled, if Fannie Reab or Lola Reab dies the survivor can collect the entire amount of money of all parties in this agreement.

Signed by

FANNIE REAB

LOLA REAB

Signed by

PHILIP REAB

Signed by Witnesses.

R. 1

LEONARD R. RYAN

NIANTIC

HERBIA BUCKLES

Illinois

MRS. GWEN CORRINGTON

MABLE E. LAWS

C. F. LAWS"

On January 15, 1951 Philip Reab died. On February 28, 1951 his will which had been executed on May 31, 1929, was admitted to probate without objection, and The Millikin Trust Company was appointed Administrator With Will Annexed. Due notice of the petition to probate the will was sent to all heirs, devisees and legatees including Lola.

On May 3, 1951 Lola Reab filed the instrument which had been executed on July 1, 1948, and petitioned for its admission to probate as a codicil to the will of Philip Reab. The County Court of Macon County, Illinois, denied probate of said instrument. Lola Reab appealed from said order to the Circuit Court of Macon County, Illinois, and on November 30, 1951 it denied probate of said instrument as a codicil to the last will and testament of Philip Reab, deceased. This appeal is from that order.

It is not disputed that the instrument was executed

in conformity to the provisions of the Statutes of the State of Illinois pertaining to the making, signing and attestation of wills. Objection was made to the admission of the instrument as a codicil on the ground that it was not a testamentary disposition of the property of Philip Reab and that is the only issue to be decided on this appeal.

The propositions of law applicable to this case are not disputed. It is not disputed that the fundamental theory of a will is an intent to make a testamentary disposition. Nor is it disputed that there is no prescribed form for a will, and that if it is the intention of the maker to dispose of his estate after his death it will operate as a will regardless of its form. Did Philip Reab so intend?

The instrument provides:

"This *agreement* * * *;"

And the last sentence of said agreement provides:

"* * * the entire amount of money of all parties to this *agreement*."

The use of the word "agreement" would indicate that it was the intention of the parties to come to an understanding about the subject matter of the document and not that Philip Reab was making a testamentary disposition of property. It was not designated as a will or as a codicil to his will.

A reference to the will which he executed on May 31, 1929 shows that he was familiar with the making of a will and we believe that if it had been his intention to make a codicil to that will that he would have been more articulate about it. It appears to have been a writing with reference to compensation to be paid to Fannie and Lola. The agreement was executed by Fannie and Lola. The minds of the parties were all directed toward an agreement with reference to compensation for services rather than the testamentary disposition of property. The words "can collect from my estate after my death" indicate the time when they were to be paid for the services and indicate that it was his intention that the services be paid for and that they not be regarded as gratuitous services. It was provided that "Fannie can collect for care, room, board and laundry" and that "Lola can collect for my care." This is certainly not a testamentary

disposition of any property, but an agreement to pay for whatever services might be rendered to him.

No words of devise or bequest are used anywhere in the instrument except where it was provided that Fannie and Lola "can have all money from corn and beans that come off my farm at Niantic, county of Macon, State of Ill. at my death until my (Philip Reab) estate is settled, if Fannie Reab or Lola Reab die the survivor can collect the entire amount of money of all parties in this agreement." These words cannot be separated from the remainder of the instrument in which they are used, and it is our opinion that they are further words with reference to the compensation to be realized by Fannie and Lola, and not an intent to make a testamentary disposition of the property of Philip Reab.

The fact that Philip provides in the same sentence that if either Fannie or Lola dies the survivor can collect the entire amount of money of all parties in the agreement indicates that he was thinking of the money from the corn and beans in the same way he was thinking of the money set forth in the hourly rate in the earlier part of the agreement, and that is as compensation for services rendered to him. We do not believe that this agreement can be considered and held to be a contract in part and a will in part. We fail to find the intent to make a testamentary disposition of property; and for this reason the judgment of the Circuit Court of Macon County is affirmed.

AFFIRMED.

9818

(7419-6-67) 14

348-1.A.224

1

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the ^{Third}~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HARRY E. WHEAT, Presiding Judge

HONORABLE CHARLES A. O'CONNOR, Judge

HONORABLE C. ROSS REYNOLDS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of NOVEMBER A. D. 1952, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

Virginia Mehrhoff, Plaintiff-Defendant in Error, vs. Jesse Moore and Charity Mae Moore, Defendants-Plaintiffs in Error.

General No. 9818

MR. JUSTICE REYNOLDS delivered the opinion of the Court.

The Circuit Court of Greene County decided a Habeas Corpus proceeding in favor of Virginia Mehrhoff, petitioner and plaintiff, and against Jesse Moore and Charity Mae Moore, the respondents and defendants. The Moores have appealed.

Plaintiff, Virginia Mehrhoff, is the mother of Donna Jean Gilmore who was born on May 14, 1945. Jesse Moore and Charity Mae Moore, the defendants, are the maternal grandparents of Donna Jean Gilmore.

Defendant in Error, Virginia Mehrhoff, was first married to George R. Gilmore in June, 1942. Gilmore left the Continental United States in April, 1943 as a member of the armed forces of the United States and remained out of the United States until July, 1945. The evidence is rather conclusive that the child, Donna Jean Gilmore, was conceived while George R. Gilmore, the husband of her mother, was outside the Continental limits of the United States. Upon Gilmore's return, he obtained a divorce from the Defendant in Error, charging her with adultery. The Defendant in Error kept the child, Donna Jean Gilmore, for two months after her birth and then apparently on account of financial circumstances and her inability to take care of her child and provide for herself and her child, left it with her parents, Jesse Moore and Charity Mae Moore.

The evidence is conflicting about the amount of support that Defendant in Error furnished for her child but at the most, it was very meager.

Virginia Gilmore, the Defendant in Error, later married Harold Mehrhoff on April 21, 1946 and a child, Shirley, was born to them in October, 1946. It seems that they have a very comfortable and happy home. Mehrhoff is an express messenger, earning a substantial salary.

The maternal grandparents had the custody of the child from about two months after its birth until this proceeding was decided in the Circuit Court of Greene

County on July 27, 1951. They took the child when it was small and under a doctor's care; they have supported it; they have cared for it; they have paid the doctor bills and have given it their love and affection. The mother has visited the child on different occasions and furnished some small part of its clothes.

The grandparents seek to reverse the decision of the trial court on the ground that the mother abandoned the child and forfeited her natural right to the custody of the child; that the mother is an unfit person to have the custody of the child and that the welfare and the best interest of the child will be best served by leaving the child with them. They contend that the order of the trial court was contrary to the law and the greater weight of the evidence.

In cases involving the custody of a minor, the primary and paramount concern is for the best interests and welfare of the child. *People v. Wingate*, 376 Ill. 244, 251; *Scott v. Ashcraft*, 342 Ill. App. 33. However, in numerous cases the courts have repeatedly held that a fit and proper parent has the right to custody against the world, unless the natural right of custody has been forfeited. *People v. Sheehan*, 373 Ill. 79, 81; *Stafford v. Stafford*, 299 Ill. 438; *Sullivan v. People*, 224 Ill. 468; *Bush v. Bush*, 342 Ill. App. 86.

It follows then that if the mother has abandoned her child or if she is now an unfit person, she should be denied the custody of her child. If she has not abandoned her child and the evidence does not show her to be an unfit person as of the date of the hearing, then the only matter to be considered by this court is the best interest of the child. *People v. Wingate*, 376 Ill. 244; *Scott v. Ashcraft*, 342 Ill. App. 33.

It is admitted that the mother left the child with her parents when it was about two months old and it is not disputed but what they have taken good care of the child during the time that she was with them.

Can it be said that a mother in financial difficulties, with a small child, has abandoned her child when she takes it to her own mother to care for? We do not believe so.

The conduct of the mother some years prior to the hearing is not involved in this proceeding. At the time of the hearing, she was the mother of another

child and from all of the evidence, was caring for it as a mother should. There was some evidence that she occasionally took this child, in company with other people, to a neighborhood tavern where intoxicating liquors were sold along with soft drinks. There was no evidence that at the time of the hearing or within any reasonable length of time before it, that she ever used intoxicating liquors to excess.

In the case of *Scott v. Ashcraft*, 342 Ill. App. 33, the court said: "It is well established that in reviewing a case of this type that this court must keep in mind that the trial judge was aided by his opportunity to view the witnesses as they testified, and his decision should not be disturbed unless the findings are palpably against the weight of the evidence". In this case the presiding judge had the opportunity of observing the witnesses while testifying, to appraise their sincerity, demeanor and character or lack of it and his decision that the mother was legally and naturally entitled to the care, custody, control and education of her child will not be disturbed.

As has been said many times, it is a difficult task for a court to take a child away from someone who has bestowed love and affection upon it but when consideration is given to the advantages a child has by living with its mother and a sister of nearly the same age, it must be said that the happiness and welfare of the child will outweigh the sorrow and sense of loss suffered by the grandparents.

We feel that the trial court reached the correct conclusion in this case and that the order of the trial court should be and is affirmed.

AFFIRMED.

9841
STATE OF ILLINOIS

348 I.A. 224
2.

APPELLATE COURT

AT AN APPELLATE COURT, for the ^{Third} ~~Fourth~~ Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HARRY E. WHEAT, Presiding Judge

HONORABLE CHARLES A. O'CONNOR, Judge

HONORABLE C. ROSS REYNOLDS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of NOVEMBER A. D. 1952, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

The People of the State of Illinois, Plaintiff-Defendant in Error, vs. John Williams, Defendant-Plaintiff in Error.

General No. 9841

MR. JUSTICE REYNOLDS delivered the opinion of the Court.

This cause comes to this court on a writ of error from the County Court of Adams County. It is a criminal contempt proceeding, wherein the defendant is charged with testifying falsely under oath, in the presence of the court, with intent to obstruct justice and bring the law into disrespect. Upon a hearing the Court found the defendant guilty and sentenced him to the Illinois State Farm at Vandalia for a period of six months. The facts in the cause are stipulated by both parties and show that the defendant was placed on the witness stand for the purpose of qualifying himself as a bondsman. He testified under oath in open court before the County Judge that he was the owner of three properties, one located at No. 223 North 3rd Street, one at No. 225 North 3rd Street and one at No. 316 North 3rd Street, all in the City of Quincy, County of Adams, State of Illinois; that the property at No. 316 North 3rd Street was in his wife's name and that she was in open court; that there had been a mortgage on the property at No. 316 North 3rd Street, but that it had been paid off. On being asked if there were any mortgages against his two properties, or anything against them, the defendant replied "No". It was then shown that there was in fact a mortgage in the amount of \$2,250.00 against the property at No. 223 North 3rd Street, and that this had been reduced to \$1,500.00 but that there were no mortgages against the other two properties. It was further shown that the property at No. 225 North 3rd Street and the property at No. 316 North 3rd Street, were each worth in excess of \$10,000; that the defendant testified that he was somewhat hard of hearing and did not understand the questions put to him at the time of the hearing on his qualifying as a bondsman, but upon cross examination he stated he had understood the question as to whether or not there were any mortgages against either of the properties, and he also admitted that he had answered

in the negative; that the property at No. 223 North 3rd Street was actually under a mortgage, having been recently acquired.

It thus appears that leaving out the property under mortgage, and the property owned by his wife, that the defendant owned property worth in excess of \$10,000. The bond on which the defendant sought to qualify as a bondsman was for \$1,500.00, so that the one property owned by the defendant was ample security for the bond, without reference to the other two properties.

This court recognizes that the dignity of courts must be upheld and that the court should punish for contempt in proper cases. In this case, however, there seems to be some question as to whether or not there was in fact any contempt committed or intended. The defendant said he was somewhat hard of hearing. If he was confused as to the questions at the time of qualification and did not properly understand their import, he might just as well have misunderstood the questions put to him on cross examination at the time of his trial. If he was confused or did not understand, he certainly would not be in contempt of court.

The appeal raises several questions, but the one that seems to have been overlooked is the question of the materiality of the testimony of the defendant at the time of qualifying as a bondsman. If the defendant testified falsely on a material matter, he committed perjury and also was in contempt of court. On the other hand if the testimony was deliberately false and was to an immaterial matter, it is neither perjury or contempt. In the case of *The People of the State of Illinois v. Dewey Bullock*, 336 Ill. App. 151, the Court there said: "The giving of false testimony as to an immaterial matter does not constitute 'contempt or perjury'." In this case, even if the defendant has testified falsely as to the property at No. 223 North 3rd Street, which was actually encumbered, and such false testimony was deliberately done, which is open to question, it is still immaterial. The one property at No. 225 North Third Street was ample security for the bond, and the testimony as to No. 223 North Third Street is immaterial as to the matter before the court, namely, was the defendant the owner of sufficient real estate over and above his legal exemptions and any

Page 3

Gen. No. 9841

encumbrances to qualify on the \$1,500.00 bond. It seems that he was.

For the reasons stated, the judgment of the County Court is reversed.

REVERSED.





CHICAGO
DEC 16 1952
ASSOCIATION
348 I. A. 386.

Appellee,

V.

Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE

This is an appeal from a judgment for \$3000 entered upon a verdict. Defendant and her husband owned the property at 2628 South 48th court, Cicero, and plaintiff and her husband were tenants thereof. It is claimed by plaintiff that on August 3, 1948, while she was in the yard alongside the house, hanging a clothesline, defendant called down to her from a porch window on the second floor, cursed her, and called her vile names; that plaintiff called back to defendant not to holler at her; that she would move out of the premises; that defendant then took a screen out of the window and threw it at plaintiff, hitting her over the head; that eyeglasses which plaintiff was wearing caught in the wire, the nosepiece hit her in the corner of her eye, and the wire scratched her eye, resulting in impairment of her sight. Defendant denied this and was supported by her husband, who testified that they never had a screen on their back porch such as the one in question. A physician testified that there was swelling on the left side of plaintiff's head; that her nose was swollen, and that there was some swelling about the left eye. On the first examination he did not find an infection of the eye, but ecchymosis developed and later conjunctivitis.

2000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

Complaint is made of two instructions, first, that if the jury believed from the evidence that any witness wilfully swore falsely on any material issue, they were at liberty to disregard the entire testimony, except insofar as it had been corroborated by other credible evidence; and second, that a definitive instruction with respect to damages failed to state that the burden was on plaintiff to prove the damages. The criticism is well taken. (Hanlon v. Lindberg, 319 Ill. App. 1; People v. Arcabascio, 395 Ill. 487; People v. Wells, 380 Ill. 347; People v. Flynn, 378 Ill. 351.)

We have gone over the record and we are convinced that the damages are excessive. There is certainly not sufficient evidence in the record to connect the alleged deficiency in vision with the injury proved. The verdict is so much in excess of what is reasonable that we must attribute it to prejudice or passion on the part of the jury. The trial court recognized this by seeking to enforce a remittitur of \$1000. As the issues are very sharply in conflict, we feel that justice requires a new trial rather than an attempt on our part to cure the error by ordering a remittitur. Judgment will, therefore, be reversed and the cause remanded with directions to grant a new trial.

Judgment reversed and cause
remanded with directions.

Robson, P. J., and Lynch, J., concur.



45759

JAMES BISHOP,

Appellee,

v.

METROPOLITAN MUTUAL ASSURANCE
COMPANY OF CHICAGO, a
corporation,

Appellant.

)
) APPEAL FROM MUNICIPAL
)
) COURT OF CHICAGO,
)
)
)

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE
COURT.

This is an appeal from a judgment for \$600 entered on a finding by the court in a suit on an insurance policy issued by defendant on the life of Vernice Bishop, wife of plaintiff. Defendant contends that the policy did not take effect because the insured was not in good health on the date of issue, as provided by the policy. Defendant further contends that the policy was obtained by fraud in the giving of false answers in the application for insurance. In its points and authorities defendant, however, seems to rely on the latter defense.

An application for the policy was offered in evidence, but an objection was made to its introduction. The court reserved its ruling, and the application was never admitted. Therefore, we cannot consider the point that misrepresentations were made in the application for insurance. Defendant contends that even though the application was not admitted in evidence, it was set up as an affirmative defense in its answer; that plaintiff did not file a reply denying the allegations with respect to this defense and that, therefore, it stands admitted. It appears from the record, however, that defendant sought to introduce evidence on the material issues in the case,

THE FIRST PART OF THE

SECOND PART OF THE

THIRD PART OF THE

FOURTH PART OF THE

FIFTH PART OF THE

SIXTH PART OF THE

SEVENTH PART OF THE

EIGHTH PART OF THE
NINTH PART OF THE
TENTH PART OF THE
ELEVENTH PART OF THE
TWELFTH PART OF THE
THIRTEENTH PART OF THE
FOURTEENTH PART OF THE
FIFTEENTH PART OF THE
SIXTEENTH PART OF THE
SEVENTEENTH PART OF THE
EIGHTEENTH PART OF THE
NINETEENTH PART OF THE
TWENTIETH PART OF THE
TWENTY-FIRST PART OF THE
TWENTY-SECOND PART OF THE
TWENTY-THIRD PART OF THE
TWENTY-FOURTH PART OF THE
TWENTY-FIFTH PART OF THE
TWENTY-SIXTH PART OF THE
TWENTY-SEVENTH PART OF THE
TWENTY-EIGHTH PART OF THE
TWENTY-NINTH PART OF THE
THIRTY PART OF THE
THIRTY-FIRST PART OF THE
THIRTY-SECOND PART OF THE
THIRTY-THIRD PART OF THE
THIRTY-FOURTH PART OF THE
THIRTY-FIFTH PART OF THE
THIRTY-SIXTH PART OF THE
THIRTY-SEVENTH PART OF THE
THIRTY-EIGHTH PART OF THE
THIRTY-NINTH PART OF THE
FORTY PART OF THE
FORTY-FIRST PART OF THE
FORTY-SECOND PART OF THE
FORTY-THIRD PART OF THE
FORTY-FOURTH PART OF THE
FORTY-FIFTH PART OF THE
FORTY-SIXTH PART OF THE
FORTY-SEVENTH PART OF THE
FORTY-EIGHTH PART OF THE
FORTY-NINTH PART OF THE
FIFTY PART OF THE
FIFTY-FIRST PART OF THE
FIFTY-SECOND PART OF THE
FIFTY-THIRD PART OF THE
FIFTY-FOURTH PART OF THE
FIFTY-FIFTH PART OF THE
FIFTY-SIXTH PART OF THE
FIFTY-SEVENTH PART OF THE
FIFTY-EIGHTH PART OF THE
FIFTY-NINTH PART OF THE
SIXTY PART OF THE
SIXTY-FIRST PART OF THE
SIXTY-SECOND PART OF THE
SIXTY-THIRD PART OF THE
SIXTY-FOURTH PART OF THE
SIXTY-FIFTH PART OF THE
SIXTY-SIXTH PART OF THE
SIXTY-SEVENTH PART OF THE
SIXTY-EIGHTH PART OF THE
SIXTY-NINTH PART OF THE
SEVENTY PART OF THE
SEVENTY-FIRST PART OF THE
SEVENTY-SECOND PART OF THE
SEVENTY-THIRD PART OF THE
SEVENTY-FOURTH PART OF THE
SEVENTY-FIFTH PART OF THE
SEVENTY-SIXTH PART OF THE
SEVENTY-SEVENTH PART OF THE
SEVENTY-EIGHTH PART OF THE
SEVENTY-NINTH PART OF THE
EIGHTY PART OF THE
EIGHTY-FIRST PART OF THE
EIGHTY-SECOND PART OF THE
EIGHTY-THIRD PART OF THE
EIGHTY-FOURTH PART OF THE
EIGHTY-FIFTH PART OF THE
EIGHTY-SIXTH PART OF THE
EIGHTY-SEVENTH PART OF THE
EIGHTY-EIGHTH PART OF THE
EIGHTY-NINTH PART OF THE
NINETY PART OF THE
NINETY-FIRST PART OF THE
NINETY-SECOND PART OF THE
NINETY-THIRD PART OF THE
NINETY-FOURTH PART OF THE
NINETY-FIFTH PART OF THE
NINETY-SIXTH PART OF THE
NINETY-SEVENTH PART OF THE
NINETY-EIGHTH PART OF THE
NINETY-NINTH PART OF THE
HUNDRED PART OF THE

including the application and the misrepresentations alleged to have been made, and did not take the position at the trial that these were admitted because of plaintiff's failure to reply thereto. Under such circumstances, it is considered that failure to file a reply is waived, and the absence of a reply does not constitute an admission. Sottiaux v. Bean, 408 Ill. 25; Cienki v. Rusnak, 398 Ill. 77.

On the question of deceased's health, defendant introduced in evidence hospital records and a death certificate. These, defendant argues, shows that deceased was not in good health; that about eight months prior to the issuance of the policy she gave birth to a baby; that she was in the hospital five days, and that she had been having dizzy spells; that she had been in Provident Hospital in 1945, and that she had been having dizzy spells daily for four years prior to her death; and that the hospital record shows she had a mid-line supra-pubic scar, thereby substantiating the fact that she had a lower abdominal operation. A physician testified hypothetically that the disease of nephrosclerosis does not happen overnight, and that a person who had dizzy spells daily for four years since a lower abdominal operation and had given birth to a baby about eight months before her death from a subarachnoid hemorrhage and nephrosclerosis was not in good health on the date of issuance of the policy. As against this testimony, is the testimony of the husband who said that his wife was in good health and did not have dizzy spells. The phrase "good health" is not an absolute term. The records submitted may, under the circumstances, have probative value, but are not conclusive against the testimony of the husband with

1920-1921

The first of the most important of the things which I have learned in the last few years is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The second thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The third thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The fourth thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The fifth thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The sixth thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The seventh thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The eighth thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The ninth thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose. The tenth thing I have learned is that the world is not what it seems to be. It is a vast and complex system of interlocking parts, each of which has its own life and its own purpose.

-3-

respect to the good health of his wife. In the light of this conflicting testimony, we cannot say that the lower court erred in finding for plaintiff.

Judgment affirmed.

Robson, P. J., and Tucky, J., concur.

1. The first part of the report
describes the general situation
of the country and the
state of the economy.
2. The second part of the report
describes the state of the
economy and the state of the
economy.



45614

LE ROY VERL BROADBENT,
Appellee,

v.
MARY BOBAK et al.,
Defendants.
TILLIE P. CAMP and EDGAR CAMP,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Tillie P. Camp and Edgar Camp, the principal defendants in a real estate foreclosure proceeding, appeal from an adverse decree entered in the Circuit Court pursuant to a hearing before a master in chancery whose findings and recommendations were approved by the chancellor and incorporated in the decree.

The appealing defendants' statement of the case, which is conceded by the prevailing parties to be substantially correct except in one or two particulars, discloses that on August 15, 1927 Fred W. Siedentopf and his wife Hermine, being indebted in the sum of \$6000.00, executed and delivered eight bonds or notes referred to in the pleadings as "principal notes," payable to the order of the First Trust and Savings Bank of Hammond, Indiana, secured by their trust deed, of the same date, to Henry F. W. Schultz, as trustee of the real estate upon which the foreclosure decree was entered. Four of the principal notes were for \$1000.00 each, and the remaining notes for \$500.00 each, all due August 15, 1932. The original plaintiff, Le Roy Verl Broadbent, claimed to be the owner of seven

of these notes, aggregating \$5500.00, and the eighth note, in the sum of \$500.00, was owned by Mary Francisco.

In 1931 John S. Paplinski and Tillie Paplinski, now Tillie Camp, one of the appellants, became the owners as tenants in common by purchase of the property located at the southeast corner of Sibley boulevard and Freeland avenue in Calumet City, Illinois, and improved with a store and an apartment, herein sought to be foreclosed. Immediately upon acquiring title they appointed Ronald Molen, engaged in the real estate business, to act as agent in the management of the property. Molen continued in that capacity up to the time of the death of John Paplinski, and thereafter until suit was filed on June 14, 1940 in the City Court of Calumet City by Mary Bobak (a defendant in the present suit) against Molen and others, in which suit Tillie Paplinski Camp filed a counterclaim.

John Paplinski died intestate in Cook County, Illinois, in October of 1933, leaving Tillie, his wife and others as his heirs at law. During his lifetime Paplinski was indebted to the defendant Thomas Bobak in the sum of \$2360.00, for which a claim was allowed in the Probate Court in September 1934 against his estate. There was no money with which to pay this claim, and in order to close the estate Tillie Paplinski, as administratrix and in her own behalf as widow, executed and delivered two quitclaim deeds absolute on their face, conveying all her interest in the property to Mary Bobak, wife of the defendant Thomas Bobak.

10

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

100

10. *Chlorophyll a* (mg/g)

•

After Paplinski's death Molen continued to act as agent for the owners of the property, particularly for the defendant Tillie Paplinski (now Camp), in whose name he carried the account in his ledger. It is claimed by the appealing defendants that from knowledge gained through his agency, Molen, from 1936 through 1944, purchased the bonds upon which Chester Kaczynski, the substituted plaintiff, now claims his right to foreclose. From the date of the conveyances of Tillie Paplinski to Mary Bobak, until a receiver was appointed, Molen remained in complete possession of the premises, collecting the rents and managing the property, and keeping an account in the name of Tillie Paplinski. Out of the rent he paid operating expenses. The Camps contend that during this period he acquired six of the bonds in question.

In June 1940 Mary Bobak instituted suit against Molen and the owners of the premises, including the defendant Tillie Paplinski Camp, in which she sought an accounting by Molen for the rents collected by him subsequent to the death of John Paplinski. A receiver was appointed for the property, and by agreement of the parties the proceeds from the receiver's collection were from time to time divided, two-thirds being paid to Mary Bobak and one-third to the heirs and assignees of the heirs at law of John Paplinski. From this source the Bobaks received the sum of \$2647.76, which the master found was "more than sufficient to pay the amount of the claim which Thomas

Bobak had filed in the Probate Court of Cook County."

Molen died in 1947, and while the suit in Calumet City was still pending, the original plaintiff instituted the foreclosure suit, the present proceeding, in the Circuit Court of Cook County, upon the bond purchased by Molen. After several hearings before the master, Kaczinski, the substituted plaintiff, filed a supplemental complaint alleging that he had acquired the bonds formerly held by Broadbent and had leave of court to be substituted as plaintiff.

Among other defenses it is urged that the deeds from Tillie Camp to Mary Bobak constitute an equitable mortgage. The master to whom the matter was referred made an exhaustive report and, with respect to this contention, found that certain witnesses appeared and testified to facts "which might indicate that the Quit Claim Deeds under which the defendant, Mary Bobak, holds title to a portion of the real estate involved in this cause, were given only to secure a debt due from John Paplinski to Thomas Bobak and not as an absolute conveyance." He reported that these witnesses testified to certain conferences which they claimed to have had with James F. Kelley, an attorney who represented the Bobaks in the Probate Court of Cook County, but found that their testimony was "vague and indefinite"; that "in some places their testimony indicates that the Deeds were given in 'satisfaction' of the debt and in other places they

testify that they were given as 'security' for the debt"; and that Kelley denied having any such conversations. The master called attention to the fact that various written instruments and deeds which were acknowledged and under seal, upon their faces purported to be absolute conveyances; that these instruments were drawn by an attorney, were signed and sealed, and were delivered to the Bobaks; that in order to overcome the force and probative value of such important documents as recorded deeds, evidence which is positive, certain and clear must be adduced; and he found that the defendants Tillie Camp and her husband failed to make such proof. The master also considered it significant that no claim or demand was ever made by the defendants Tillie and Edgar Camp, or by any one on their behalf, for a reconveyance of this property after the money which the Bobaks had coming is alleged to have been repaid; and he found that if Mary Bobak was not the owner of a certain portion of the real estate she would not have been entitled to an accounting in the Calumet City Court, and the attorneys for the opposing parties in that cause would then, in all probability, have objected to the receiver turning over certain portions of the funds in his hands to the Bobaks; but that the manner and form in which the funds in the Calumet City Court were handled, and the orders of court entered in that cause, constituted an affirmance of the fact that the Bobaks were the actual owners of a portion of

1. *Phragmites australis* (Cav.) Trin. ex Steud. (Common reed)

1. *Phragmites australis* (Cav.) Trin. ex Steud.

1. *Phragmites australis* (Cav.) Trin. ex Steud.

Figure 1

1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

•

the real estate; and under the circumstances he concluded that Mary Bobak had an undivided interest in and to that portion of the real estate involved which was conveyed by the said quitclaim deed. We have examined the record and the testimony on this phase of the litigation and think the conclusions of the master are sustained by the evidence and are sound.

The fact that the deeds are absolute on their face is the best evidence of their construction. To declare a deed, absolute in form, to be a mortgage, the deed itself must be considered as determining the rights of the parties unless some equity is shown to the contrary. Spies v. DeMayo, 396 Ill. 255. No such showing was made in the instant proceeding. It has also been held that to create an equitable mortgage, an intention must be shown to create a lien on property, as distinguished from an agreement to apply the proceeds of sale thereof to the payment of a debt (Black on Mortgages(1903), sec. 33, pp.52-53); the intention of the parties to a conveyance is one of the controlling factors in an action to declare a deed, absolute on its face, to be other than it purports to be, i.e., security for an existing debt (Smith v. Farmers & Merchants Bank of Carlyle, 329 Ill. App. 347); and the question of intention is to be ascertained from all the circumstances (Davidson v. Iwanowski, 341 Ill. App. 152). We have already alluded to the finding of the master that the testimony of the witnesses as to the intention to create an equitable mortgage was "vague and indefinite";



it requires more than testimony of that character to create an equitable mortgage.

It is further urged by defendants that the bonds or notes of which the original plaintiff and the substituted plaintiff claimed to be the legal holders and owners, were all purchased from the rightful owners and holders thereof by Molen during his lifetime as the agent for defendants and others, with funds belonging to them, without their permission or knowledge; that by reason thereof, defendants became and are the owners of the bonds which have been paid and which are not a valid and subsisting lien against the real estate, and should be delivered up for cancellation. The master found, and the record supports the conclusion, that only the one bond or note which Molen acquired from Gluth on December 10, 1936 was acquired with funds belonging to Molen's principals who were then the owners of the real estate involved herein. The master further found that even though the monies with which Molen purchased the Gluth bond were later repaid, it is nevertheless a fact that he dipped into the funds belonging to his principals without their permission or knowledge, and therefore the Gluth bond or note became and was the property of the then owners of the real estate involved herein, and the lien thereof became nullified since it became merged into the greater interest of the parties as the owners of the real estate involved herein; that the balance of the bonds or notes which were acquired

by Molen and turned over by him to his wife were purchased with his own private funds; that the amounts due and owing thereon have never been paid, and ^{the bonds} are therefore good, valid and subsisting liens for the amounts due and owing thereon, plus interest; and accordingly the master concluded that there is no merit to the contention that Molen was acting in a fiduciary capacity when he acquired said bonds.

Among other defenses it is urged by defendants that if plaintiffs ever had any cause of action against defendants, or any of them, such action accrued or arose more than ten years before the filing of the complaint, and that the obligations claimed to be due and owing by plaintiff have been barred by the Statute of Limitations. The record discloses that interest was paid on all the bonds or notes involved to August 15, 1938; that the complaint in this proceeding was filed January 6, 1948, which was less than ten years after the date of the last payment of interest. It would follow that the defense of the Statute of Limitations could not be asserted, and the chancellor properly adopted the master's findings and recommendations that it should be overruled.

Lastly it is urged by defendants that the pendency of the action in the City Court of Calumet, purporting to involve the same subject matter and the same parties or their privies, is decisive of the issues in this foreclosure proceeding, and therefore constitutes a bar to this suit. Specifically, defendants contend that even though plaintiffs are the owners or holders of some of the bonds or

notes involved herein, they were purchased by them after maturity and after June 14, 1940, when Mary Boback filed suit against Molen et al. in the City Court of Calumet. This defense was not raised in defendants' answer to the supplemental complaint and must therefore be deemed to have been waived; they proceeded in the foreclosure suit without objection. Moreover, the Calumet City suit is different from the case at bar; the issues are not the same, the prior suit being essentially a suit for the accounting of rents by Molen and not an attempt to foreclose the trust deed; the parties are also different--all the holders of the mortgage bonds are not made parties to the prior suit, as they are here, and the trustees of the trust deed and of the second mortgage were not made parties, as they are in this case. Although the Calumet City suit was pending when the foreclosure proceeding was brought in Cook County, and is still pending, defendants never interposed that action as a bar to the prosecution of the foreclosure suit.

For the reasons indicated, the decree of the Circuit Court should be affirmed, and it is so ordered.

DECREE AFFIRMED.

NIEMEYER, J., and BURKE, J., Concur.

9843
STATE OF ILLINOIS

348 I.A. 387

APPELLATE COURT

AT AN APPELLATE COURT, for the ~~Fourth~~^{Third} Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE HARRY E. WHEAT, Presiding Judge
HONORABLE CHARLES A. O'CONNOR, Judge
HONORABLE C. ROSS REYNOLDS, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 5th day
of NOVEMBER A. D. 1952, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

**John Rhynders, Plaintiff-Appellee, vs. John L. McCaw,
Defendant-Appellant.**

General No. 9843

MR. JUSTICE REYNOLDS delivered the opinion of the Court.

The plaintiff John Rhynders obtained a judgment for \$7,500.00 against the defendant John L. McCaw, for personal injuries resulting from a collision between the automobile driven by the plaintiff, and a truck driven by the defendant, on the highway about three miles west of Springfield, Illinois. The defendant appeals from such judgment.

On the 17th day of November 1947, the plaintiff was driving his Chevrolet automobile in a westerly direction on a two lane paved highway about three miles west of Springfield, Sangamon County, Illinois. At the same time, the defendant was driving his truck eastwardly on the same highway, the car and the truck approaching each other at a point where a black top road intersects and runs north from the highway the plaintiff and the defendant were driving upon. The car and the truck collided and after the collision, the Chevrolet car went into the ditch on the north side of the highway and the truck was turned around so that it faced the west and was partly on the north side of the highway, or the west bound lane. The truck was damaged on the right front and the Chevrolet was damaged on the left front. The testimony as to what caused the accident is conflicting. John Rhynders claimed that McCaw turned in front of him. McCaw claims that Rhynders was driving on the wrong side of the road, passing or attempting to pass another car, at the time of the accident.

The question of fact, the cause of the accident, was passed upon by the jury in arriving at their verdict. We are not disposed to disturb their findings in that respect. It has repeatedly been held by this court and other courts in Illinois, that the findings of a jury, or when heard by a court without a jury, the findings of a trial judge, where the evidence is conflicting, will not be disturbed unless clearly wrong; that unless the findings are clearly and manifestly against the weight of the evidence, the Appellate Court is not justified

in reversing the judgment. *Western and Southern Life Ins. Co. v. Brueggeman*, 323 Ill. App. 173; *City of Quincy v. Kemper*, 304 Ill. 303; *Sullivan v. Morey*, 326 Ill. App. 553; *Kinney v. Hall*, 332 Ill. App. 662.

The defendant has assigned thirteen errors. Of the thirteen errors assigned, seven fall within the province of the trial court and the jury, who had the opportunity of seeing and hearing the witnesses, and as said before, unless clearly and palpably erroneous, should not be disturbed. We cannot say that the decisions of the trial judge or the verdict of the jury are so clearly and palpably erroneous as to warrant reversal.

Numbers 9 and 10 of the errors assigned allege prejudice and sympathy on the part of the jury but there is nothing in the record to support this charge.

Numbers 11 and 12 of the errors assigned allege that the court erred in admitting improper evidence on the part of the plaintiff, and refused proper evidence on the part of the defendant. The evidence complained of is that of Dr. Holben and William Cochran, on the part of the plaintiff. Number 12 of the assigned errors sets forth that proper evidence for the defendant was refused but there is nothing in the record to substantiate this allegation. It is not pursued in the defendant's brief. As to the evidence of Dr. Holben and Mr. Cochrane, a careful reading of their testimony fails to disclose where their testimony, that is, the part objected to, prejudiced or injured the defendant's cause. Some of their testimony is vague and inconclusive but the jury was entitled to hear it for what it was worth.

Number 7 of the errors assigned alleges that the trial court erred in giving improper instructions offered by the plaintiff, and refused proper instructions offered by the defendant. An examination of the record shows that nearly 30 instructions were given and while there may be some error in the instructions, as a whole we think they fairly state the law applicable and we do not find any reversible error in the instructions.

The final error assigned is that the verdict rendered is excessive. We have repeatedly held that damages awarded a plaintiff in a personal injury suit, will not be set aside unless so palpably excessive as

to indicate some improper motive on the part of the jury. There is nothing in this record to indicate any improper motive on the part of the jury and since this finding is so exclusively the province of the jury, we do not feel disposed to interfere and therefore the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.





PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error.

v.

MICHAEL KARPA, LOUIS GRIMES,
OILLIE FREEMAN, TOBY SCOTT,
EMON REED, CARL PEPPERS, JACK
CHANLEY, MELVIN CROSS, ROOSEVELT
BUCHANAN, LAMBERT SAGE, JACK
BUPCH, BERNARD McDONOUGH,
ROBERT WATERFORD, ALEXANDER
KEMPF.

Plaintiffs in Error.

ERROR TO

CRIMINAL COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION
OF THE COURT.

Defendants were indicted, tried without a jury and found guilty in the Criminal Court of Cook County for assault with deadly weapons, in violation of section 60, chapter 38, Illinois Revised Statutes 1949. The case was in process of trial for about seven weeks, during which time voluminous testimony was adduced, comprising a record of approximately 3500 pages.

Almost half the evidence was read into the record by stipulation. It appears that on April 5, 1949, about 7:30 a.m., a group of men were walking a picket line in front of Elkhay Manufacturing Company in Cicero. A fight, lasting about three to five minutes, ensued, during which Coleman Travers, the complaining witness, was injured. Police arrived on the scene and arrested thirty-three CIO union men; twenty-six were indicted. At the close of the State's evidence, four defendants were discharged, at the close of the entire case, eight others were discharged, fourteen were convicted; of these, nine were fined \$500.00

1. 1990年12月25日，在“九七”香港回归前夕，香港各界人士纷纷发表文章，讨论香港回归后的前途。其中，不少文章都提到，香港回归后，将实行“一国两制”，保持香港的繁荣和稳定。

each, the other five were sentenced to the County Jail for one year and fined \$1000.00 each.

Upon trial the State proceeded on the theory that the union involved in the labor dispute was communist dominated; that it had failed to file noncommunist affidavits and could therefore not seek aid from the National Labor Relations Board; that it was losing the Elkay contract, as a result of which its members decided to slow down production, which led to the firing of the night shift and the loss of their jobs by the day shift; that a picket line was formed, and the men conspired together to assault the workers on April fifth; that suddenly on that day a host of pickets journeyed to Elkay in automobiles and, in furtherance of the conspiracy, beat up a carload of workers going into the plant.

Defendants denied that contracts, labor disputes, communism, work stoppage and slowdowns had any thing to do with the fight on the picket line April fifth. They contend, rather, that the night shift was fired without cause; that the plant gates were locked the next morning so that the CIO employees could not enter; that the day shift decided, by vote, to go back to work the following Monday morning but was fired by telegram Sunday night, the purpose of the company being to break the union; and that picketing ensued thereafter. As to the fight itself, defendants advanced the theory that an automobile, loaded with strikebreakers, approached the plant and stopped,

that men emerged from it, swinging blackjacks at the pickets, that this was a premeditated and deliberate assault on peaceful pickets, designed to halt the picketing; and that the pickets merely did the best they could to defend themselves.

Defendants, under their points and authorities, set out thirteen errors, with many subdivisions, alleged to have been committed by the trial judge; at least two of these constitute reversible error.

Although the crux of the case concerned a fight on the picket line, the court permitted the political beliefs of witnesses to enter into the testimony. Osby, one of the state's witnesses, was asked by the judge to define communism; Lowe, one of the defendants, was asked if he was a communist sympathizer; McDonough, another state witness, was asked to define a communist. They all denied communist affiliation, but the trial judge expressed doubt as to their veracity. Evidently the same curiosity that impelled the judge to ask about communism, led him to inquire about the activities of some of the defendants outside of court. He examined the defendant Plair as to his outside activities, his earnings, those of his wife, and his income from property. He also examined the defendant Buchanan as to whether or not he was employed, his room rent, the dry-cleaning course he was taking under the G.I. plan, and other foreign issues; he interrogated McDonough as to his knowledge of labor law. The record

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 11th inst. in relation to the matter of the ...
and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.
I am, Sir, very respectfully,
Your obedient servant,
J. H. ...

also discloses that two of the defendants, McDonough and Kempf, were forced to testify against themselves, under threats of jail sentences for contempt. The State's attorney obviously was under the impression that he could secure minute books of union meetings at which a conspiracy had been planned and reduced to writing; but he was evidently in error because no such minutes existed. McDonough and Kempf were examined about such minutes and, being defendants, were entitled to judge for themselves whether they ought to answer the questions, in violation of their constitutional immunity.

In the course of the trial the judge investigated and received information from a source outside the courtroom, and undoubtedly acted upon that information. The defendant Plair had been excused from the courtroom at 3:00 p.m. each day in order to take a job. During the court session of October twentieth, the judge interrupted the trial, ordered that Plair be brought forward, and thereupon proceeded to interrogate him at length concerning the employment for which he was excused each day, and his earnings at such employment. The judge then stated: "That is \$8.80 you made each night. What are you doing collecting unemployment insurance?" The judge then examined Plair with reference to his collecting unemployment benefits. At this stage of the proceeding a motion for a mistrial was made in favor of defendant Plair and all the other defendants. During the course

of the argument on the motions for a mistrial, which were denied, the judge said: "It is about time something was done about that in the city, county, and state, a man making \$9.00 a night and collecting unemployment insurance. That is a fine how-do-you-do. *** He should be prosecuted for it. *** Before I get through I am going to find out how many of these other men are collecting unemployment insurance also." Thereafter, the judge proceeded to inquire, on his own motion, concerning the financial status of defendants' witness Joseph Lowe, as to his property, his income, etc., and after directing such inquiry to Lowe, he asked the witness whether or not he had received unemployment compensation benefits. Because of this inquiry of the court, another motion for a mistrial was made and, in denying it, the judge commented that on October twentieth an employee of the Unemployment Compensation Division had telephoned him to check on Plair's statement to the division, when he had gone there to collect compensation, that he was on trial. In making their motion, defendants' counsel pertinently observed that "if an investigation is going to be made every time a witness testifies, or every time a defendant testifies, to determine whether or not he has been receiving social security, unemployment compensation insurance, that certainly deprives these defendants of a fair trial"; but the judge responded he was "interested in knowing whether or not men who are working, making two and three hundred dollars a month

are also collecting \$20 a week from the Unemployment Compensation Bureau."

At another stage in the trial, the State requested and received an order for subpoenas duces tecum, two of which were addressed to Alexander Kempf, one of the defendants. Kempf was called to the witness stand over timely objection. By these subpoenas the State sought to secure, for use in evidence against defendants, the minute book of the minutes of meetings held by local 1119. The subpoenas were offered for identification but were thereafter withdrawn. During argument in the courtroom concerning the propriety of calling Buchanan as a witness and of seeking evidence by means of subpoenas, the trial was recessed to the judge's chambers. While there, the judge, over objections of the defendants, questioned McDonough with reference to the minutes, and in the judge's words: "We had a conference in my chambers yesterday afternoon at which time you [the prosecutor] said you wanted to file a petition that you would seek or request the Court to issue a subpoena *** and I said, why, if they have got minute books out there, let's go and get them. I took the liberty of calling out there myself. There was a girl who answered the telephone. She said that the book was there; it was available and within fifteen minutes you gentlemen representing the State and the defense counsel representing the defendants, together with the police officers, went out there." At that point, the trial was adjourned, and the

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

...the ... of ...

parties, by their counsel, in the presence of police officers and the defendant McDonough, went to the union hall, took the minute book and placed it in the custody of the clerk of the criminal court over night. We think the argument is well taken that if the contents of the minute book were material and necessary to the State, it was incumbent upon it, rather than upon the judge, to produce that evidence in the trial.

From the rather brief recital of the foregoing facts, it appears that the judge, in one instance, received information from sources outside the courtroom, perhaps unwittingly, and, in another instance, deliberately sought such information--in both cases, to the prejudice of the defendants on trial, for in both instances he acted upon the information in the course of the trial. It is a fundamental rule that, except for certain matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the record made before him in open court. In People v. Cooper, 398 Ill. 468, likewise a case tried without a jury, judgment against the defendant was reversed for the reason that the trial judge conducted private judicial investigations. In the recent case of People v. McMiller, 410 Ill. 338, defendant was indicted for murder and waived trial by jury. In finding him guilty, the trial judge indicated that he had made a private investigation and stated that "I always take the liberty of investigating, getting a little idea." The

...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...

...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...
...the ... of ...

reviewing court said that "the testimony without question proves that the defendant was guilty of the shooting and there is no merit to his contention that he was not proved guilty of murder beyond all reasonable doubt"; nevertheless, the court reversed the judgment, because of the private investigation conducted by the trial judge, with the explanation that "we cannot approve or condone such conduct by the trial judge in a criminal case. The remarks above stated indicate that he made some outside private investigation concerning the defendant previous to pronouncing sentence. It is impossible to determine from the record the extent of such investigation or how much the judge was influenced by reason of his inquiry. The search for outside information by the trial judge was wholly improper."

One of the difficulties in the trial of these defendants lies in the fact that the judge assumed that in the trial of a criminal case the court could admit any kind of evidence, some of it wholly foreign to the issues involved, and then brush aside such irrelevant evidence with the statement that the court is presumed to have considered only competent testimony. Such practice is sometimes condoned in chancery proceedings, but never in the trial of criminal cases, where the court is bound by the rules of evidence whether the trial be before it or before a court and jury. The court, in People v. Reichert, 352 Ill. 358, stated the matter succinctly: "Courts have no more right than a jury to convict the accused on incompetent evidence."

Because of these errors, we are impelled to hold that the defendants did not have a fair trial; therefore, the judgment of the Criminal Court is reversed and the cause is remanded.

Judgment reversed and cause remanded.

Niemeyer and Burke, JJ., concur.

1. The first of these is the fact that the
 second of these is the fact that the
 third of these is the fact that the

fourth of these is the fact that the

fifth of these is the fact that the

45718

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

ARTHUR HANSEN,

Plaintiff in Error.

CHICAGO BAR
DEC 16 1952
3481.A.389

WRIT OF ERROR TO

CRIMINAL COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a trial before the court without a jury in the Criminal Court of Cook County Arthur Hansen was found guilty under the second count of an indictment charging that he committed the crime of malicious mischief by breaking the window of a store at 5720 West Belmont Avenue, Chicago, and under the judgment he was sentenced to serve a term of one year in the House of Correction and to pay a fine of \$500. He has sued out a writ of error to review the judgment.

The People proved that at about 2:35 A.M. on May 30, 1950, the window of the store was smashed and that an attempt was made to take therefrom a television set. The smashing of the window caused the burglar alarm to sound. Two policemen who were in the vicinity testified that the defendant was one of the two men who committed the malicious mischief by breaking the window. The defendant denied the accusation and maintained his innocence. His testimony and the testimony of the policemen cannot be reconciled. Defendant testified that he was employed as a bartender; that he left his employment at about 1:30 in the morning; and that while driving home in the vicinity of 5720 West Belmont Avenue, Chicago he gave a stranger a lift. Defendant was apprehended immediately

Journal of Management Studies, 19(1), 67-80.

Figure 1: Schematic representation of the experimental design. The figure shows two scenarios: 'No feedback' and 'With feedback'. In the 'No feedback' scenario, a participant (P) is shown with a box labeled 'P' and a box labeled 'C' (Control). The participant is shown a sequence of numbers (1, 2, 3, 4, 5, 6, 7, 8, 9, 10) and is asked to select a number. The control box is shown with a sequence of numbers (1, 2, 3, 4, 5, 6, 7, 8, 9, 10) and a box labeled 'C'. In the 'With feedback' scenario, the participant is shown a sequence of numbers (1, 2, 3, 4, 5, 6, 7, 8, 9, 10) and is asked to select a number. The control box is shown with a sequence of numbers (1, 2, 3, 4, 5, 6, 7, 8, 9, 10) and a box labeled 'C'. The participant is shown a feedback message (e.g., 'Correct', 'Incorrect') after each selection.

after the commission of the crime. The policemen testified that the defendant offered them \$500. The evidence discloses that defendant had only \$18 on his person at the time of his arrest. Significantly, the officers did not report the alleged attempted bribe in their station report, nor did they testify to such attempted bribe at the first trial.

Fred Koeppe, another police officer called as a witness on behalf of the People, testified that about 8:30 A.M. on the morning of the arrest he talked to the defendant in the police station and "attempted to take a statement off Arthur Hansen." Defendant's attorney duly objected to that line of questioning. The trial judge permitted the State's Attorney to proceed. The officer said that he asked defendant his name and address, where he lived, where he worked, what he was doing and where he was at approximately 2:30 A.M., and that defendant "would not answer." Witness, in answer to a further question as to whether he continued to question the defendant, answered: "We did that." Defendant's motion to strike the answers was denied. The court said: "This officer testified he asked him those questions. If the defendant refused to answer on the ground his answers might incriminate him, if he has an opportunity to answer, isn't that evidence under the law? Cases hold the fact a person stands mute implies an admission of guilt, where he has an opportunity to answer and is free to answer, unless he declines to answer on the ground his answers may incriminate him." At the close of all the testimony in

a colloquy between the court and the attorney for defendant, the latter said: "You don't believe Officer Koeppe who knows nothing about this case," to which the court replied: "I believe Officer Koeppe asked the man questions and I believe Officer Koeppe when he stated the man refused to answer."

The court erred in permitting Officer Koeppe to testify that the defendant refused to make a statement. The People say that the evidence so overwhelmingly supports the judgment that the admission of the testimony could not affect the judgment. We do not agree that the evidence "overwhelmingly supports the judgment." From the colloquy recited it is apparent that in entering judgment the court gave careful consideration to the testimony of Officer Koeppe that the defendant refused to make a statement. We are satisfied that under the circumstances the admission of this testimony was prejudicial to the defendant. In People v. Rothe, 358 Ill. 52, the court said (57):

"The court permitted the prosecution to prove by an officer that the defendant refused to make a statement at the police station. In this refusal they were within their rights, and the fact that they refused to make a statement had no tendency to either prove or disprove the charge against them. The admission of this evidence was prejudicial, and since it was neither material nor relevant to the issue being tried it should have been excluded."

See also People v. Kozlowski, 368 Ill. 124, 127; People v. Hanley, 317 Ill. 39, 42; and People v. Pfanschmidt, 262 Ill. 411, 449.

For the reasons stated the judgment of the Criminal Court of Cook County is reversed and the cause is remanded for further proceedings consistent with these views.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

45725

HARRY A. SACKS and ALBERT J.
HORAN, Bailiff of the Municipal
Court of Chicago, for the use of
HARRY A. SACKS,
Plaintiffs - Appellants,

v.

AMERICAN BONDING COMPANY OF BALTIMORE,
a corporation,
Defendant - Appellee.

APPEAL FROM

CIRCUIT COURT

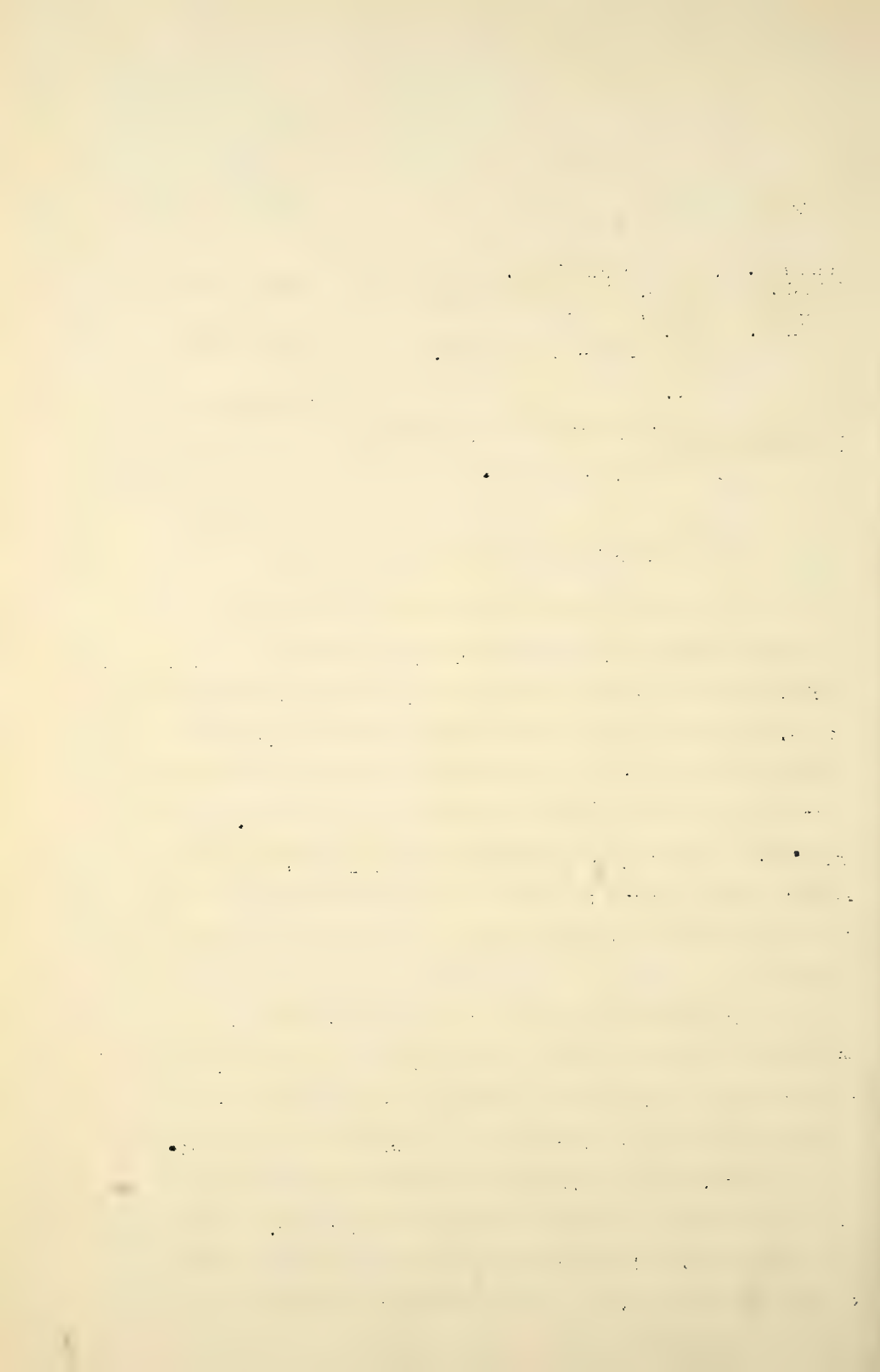
COOK COUNTY



MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs from a judgment for the defendant in an action on three bonds given in a replevin suit. The defendant was surety on each of the bonds. This was the second trial of the case and the judgment was entered in accordance with the law of the case as laid down in our opinion in a prior appeal. See Sacks v. American Bonding Company of Baltimore, 340 Ill. App. 564. The instant appeal raises the same questions that were decided adversely to appellants in the last appeal.

The only issue presented on this appeal is as to whether the trial court erred in overruling plaintiffs' motion to strike certain defenses set up in appellee's answer to the amended complaint. No part of the evidence is preserved. All reasonable presumptions are indulged in favor of the judgment below and against error. The burden of affirmatively showing error is on the party complaining thereof. Every reasonable intendment not



negatived by the record will be indulged in support of the judgment. Error is never presumed by a reviewing court, but must be affirmatively shown by the record. In the state of the record the allegations of the answer must be taken as true and established by the evidence.

The trial judge followed the law as laid down in our last opinion. Questions of law that have been decided by an appellate court on the appeal of a cause will not be again considered on a second appeal, and they are binding not only upon the trial court in the further progress of the cause but also on the appellate court in any subsequent appeal. People v. Militzer, 301 Ill. 284, and P. C. C. & St. L. Ry. Co. v. Gage, 286 Ill. 213. Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P. J., and NIEMEYER, J., Concur.



45775 and 45787

340 I.A. 390.

1.

MARIE JANOWSKI TANGALIN,

Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation, and YELLOW CAB
COMPANY, a corporation,

Defendants.

On Appeal of YELLOW CAB COMPANY,
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Marie Janowski Tangalin filed a complaint in the Circuit Court of Cook County against the City of Chicago and the Yellow Cab Company for personal injuries suffered on January 9, 1948, while she was riding in a taxicab in the City of Chicago. She averred that she was in the exercise of due care for her own safety, that the defendants were guilty of acts of negligence, and that as a direct and proximate result of one or more of such acts she was injured, to her damage in the sum of \$25,000. The answers joined issue. At the close of plaintiff's evidence the cab company's motion for a directed verdict was sustained and judgment was entered. Subsequently, on motion of plaintiff this judgment was vacated and a new trial was granted. We allowed the cab company's petition for leave to appeal.

The plaintiff was riding as a passenger for hire in a taxicab of the cab company. As the cab was proceeding

in a westerly direction on Grand Avenue and reached Orleans Street, an intersecting street, a garbage disposal truck of the City being driven south on Orleans Street, collided with the taxicab and she sustained injuries. Plaintiff, the only witness who testified as to the occurrence, said that there were automatic traffic control signals at the intersection of Grand Avenue and Orleans Street; that as the cab approached Orleans Street she saw the traffic light; that it was "green" for Grand Avenue traffic; that she saw the garbage truck "approaching the cab, going through the red light;" that the truck struck the cab at the center; that the light had changed to green in favor of the taxicab when it was east of the intersection of Orleans Street; and that when she first saw the truck it was going through the red light. She also testified that the cab "wasn't going very fast"; that she didn't know how fast the cab was going; and that she knew "he wasn't driving fast."

The trial proceeded against the City and the jury returned a verdict finding it not guilty. The court also allowed plaintiff a new trial in her action against the City, which has not appealed. Plaintiff maintains that the report of proceedings is not complete because it does not contain the proceedings following the allowance of the cab company's motion for a directed verdict and judgment. The cab company took no part in the trial after the allowance of its motion. Whether the court erred in vacating the judgment and allowing the motion for a new trial is to be determined by the record as of the time when the court acted on the motion.

— 100 —

Journal of Management Education 30(6)

[illegible][illegible]

1. *Phragmites australis* (Cav.) Trin. ex Steud.

[illegible]

1. *Phragmites australis* (Cav.) Trin. ex Steud.

The subsequent proceedings in the trial of the case against the City are not relevant. X

It is well settled that a motion to direct a verdict should be allowed if, when all the evidence is considered with all reasonable inferences to be drawn therefrom in the aspect most favorable to the party against whom the motion is directed, there is a total failure to prove one or more necessary elements of the case. Plaintiff's testimony does not establish any negligence on the part of the driver of the taxicab. In fact, her testimony absolves him from any blame for the occurrence. When she rested and the court considered the cab company's motion, the trial judge correctly decided as a matter of law that she had not made out a case to submit to the jury and properly directed a verdict and entered judgment. Under the circumstances, the court was in error in granting a new trial.

On January 17, 1952, an order was entered in the Circuit Court correcting the date of the entry of the judgment for the cab company from September 17, 1951 to September 18, 1951. The Yellow Cab Company prosecutes a separate appeal (45787) to reverse the order of January 17, 1952. That appeal is consolidated for hearing with the appeal from the order granting a new trial (45775). In view of our decision in case 45775, it is unnecessary to decide the issue raised in appeal 45787. The appeal in case 45787 is dismissed without prejudice.

The order of the Circuit Court of Cook County setting aside the judgment and granting a new trial as to the Yellow Cab Company in case 45775 is reversed.

ORDER REVERSED.



45778

PEOPLE OF THE STATE OF ILLINOIS
ex rel. FAY BARNES POWELL,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF
CHICAGO and HEROLD C. HUNT, ALFRED
H. CLARKE and PAUL G. EDWARDS, as
members of the Board of Examiners
of the Board of Education of the
City of Chicago,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The People of the State of Illinois ex rel. Fay Barnes Powell brought an action in the Circuit Court of Cook County for a writ of mandamus against the Board of Education of the City of Chicago and members of the Board of Examiners thereof. A judgment awarding the writ was reversed by this court and the cause was remanded with directions. See People ex rel. Powell v. Board of Education, 343 Ill. App. 382. The cause was redocketed in the Circuit Court. Thereupon additional pleadings were filed. On a trial without a jury the court entered judgment for the defendants. Plaintiff appeals.

The present appeal involves the identical issues presented on the prior appeal. The trial judge followed the law as laid down in our opinion on the previous appeal. The facts are not in dispute. Questions of law that have been decided by an appellate court on appeal of a cause will not be again considered on a second appeal, and they

• • • • •

[illegible]

• • • • •

100

are binding not only upon the trial court in the further progress of the case but also on the appellate tribunal in any subsequent appeal. People v. Militzer, 301 Ill. 284; P. C. C. and St. L. Ry. Co. v. Gage, 286 Ill. 213.

Therefore, the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, P.J., AND NIEMEYER, J., CONCUR.

•

1. *Phragmites australis* (Cav.) Trin. ex Steud.

348 I.A.391



45817

LILLIAN GOLDBERG,

Plaintiff - Appellant,

v.

WM. M. BRZEZICKI,

Defendant - Appellee.

) APPEAL FROM

) CIRCUIT COURT

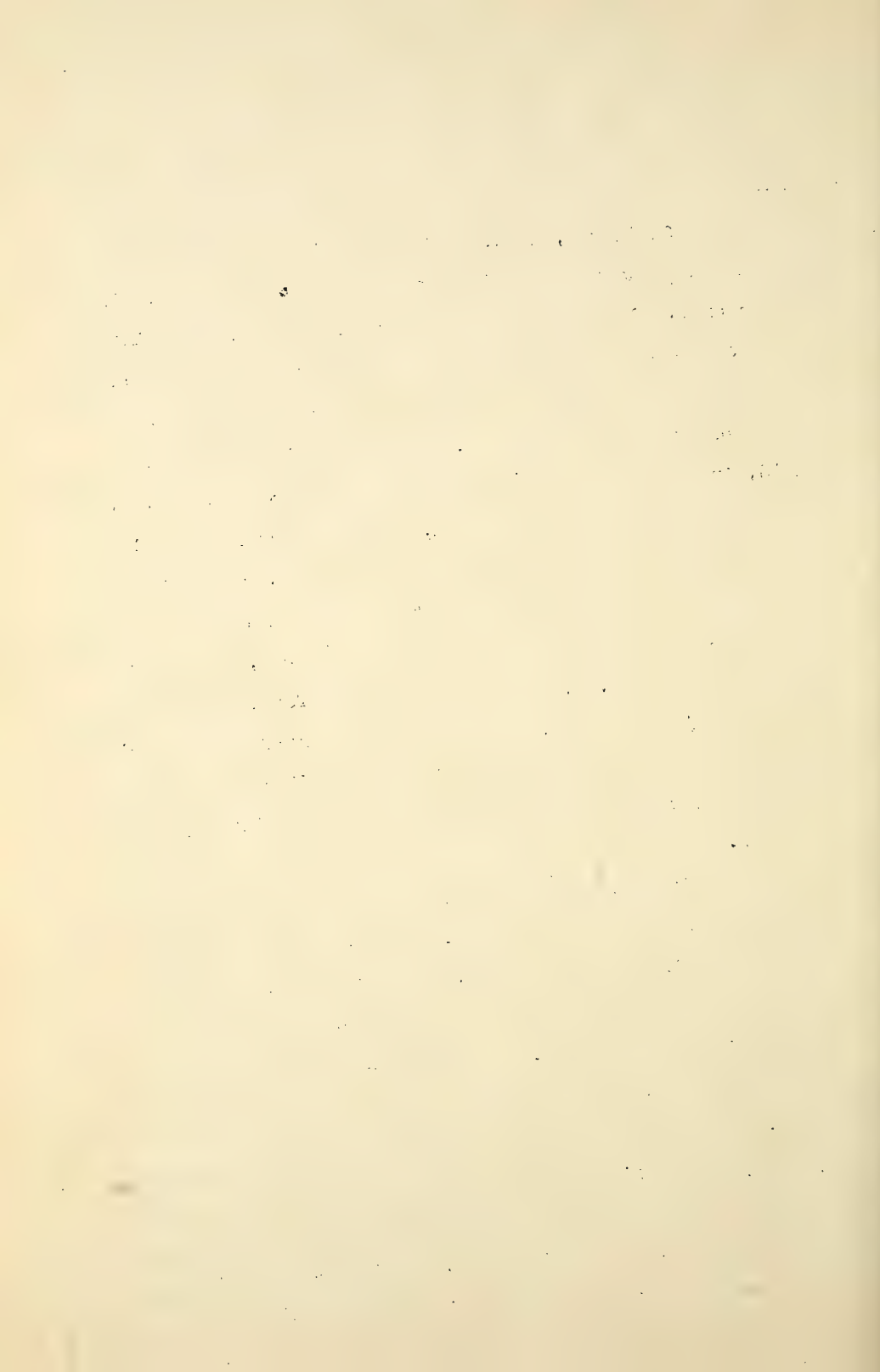
) COOK COUNTY.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On September 16, 1943, Simon L. Levy entered into a written lease with Wm. M. Brzezicki for an apartment on the second floor at 1149 Milwaukee Avenue, Chicago, at a monthly rental of \$35.00, for the term of three years commencing May 1, 1944, and expiring April 30, 1947, and from year to year thereafter until terminated by not less than sixty days' written notice, delivered in person or sent by registered mail, by either party to the other. On January 8, 1947, Simon L. Levy assigned all his right, title and interest in the lease to Lillian Goldberg. On September 2, 1947, the latter filed a statement of claim in the Municipal Court of Chicago against defendant alleging that he took and retained possession of the premises; that neither party gave notice of termination of the lease; and that defendant had not paid the rent for April, May, June, July, August and September, 1947. She asked judgment for \$285.00. Issue was joined. Following a trial there was a verdict and judgment against plaintiff, who appealed. In an opinion filed November 21, 1949, we reversed the judgment because of an erroneous instruction and remanded the cause. Goldberg v. Brzezicki, 339 Ill. App. 148, (Abst.).

On July 1, 1948, plaintiff filed a complaint against defendant in the Circuit Court of Cook County. On December 2, 1949, she filed an amended complaint alleging that the defendant continued in possession of the demised premises up to July 1, 1948, and that defendant had not paid rent for the months of April, 1947 to and including June, 1948, in the sum of \$525.00, that when she regained possession of the premises the toilet bowl, wash basin and water pipes were broken, out of repair and unfit for use, and that defendant failed to put them in the condition in which they were at the time of the execution of the lease, to her damage in the sum of \$98.00. She asked judgment for \$623.00. Defendant joined issue. On motion of plaintiff the Municipal Court case was dismissed. A trial in the Circuit Court resulted in a verdict and judgment against plaintiff, who appeals.

Plaintiff urges that the judgment is against the manifest weight of the evidence. She states that the lease was not terminated on April 30, 1947 by delivering to her personally or by registered mail a written notice at least sixty days prior thereto. Defendant denied knowledge or notice of transfer of the property or assignment of the lease. He offered evidence tending to show that on February 3, 1947, he notified Simon Levy, the original lessor, by an unregistered letter that possession of the premises would be surrendered on April 30, 1947, and that a check for the February rent was enclosed with the letter. The check in evidence shows its receipt and deposit by the attorney for plaintiff on February 14, 1947. Simon Levy denies receipt



of the letter. Defendant also offered evidence tending to show the sending of a registered letter to Simon Levy dated March 26, 1947, together with a key to the premises and a check for the April, 1947 rent. The letter concluded with the statement that as per conversations and communications with Simon Levy and the latter's attorney "this is the last month's rent and we surrender possession of the premises to you now." Simon Levy refused to accept the letter and defendant took no further steps to deliver the key or the check. On the trial defendant admitted that no rent was paid after the tender of the check for the April, 1947 rent.

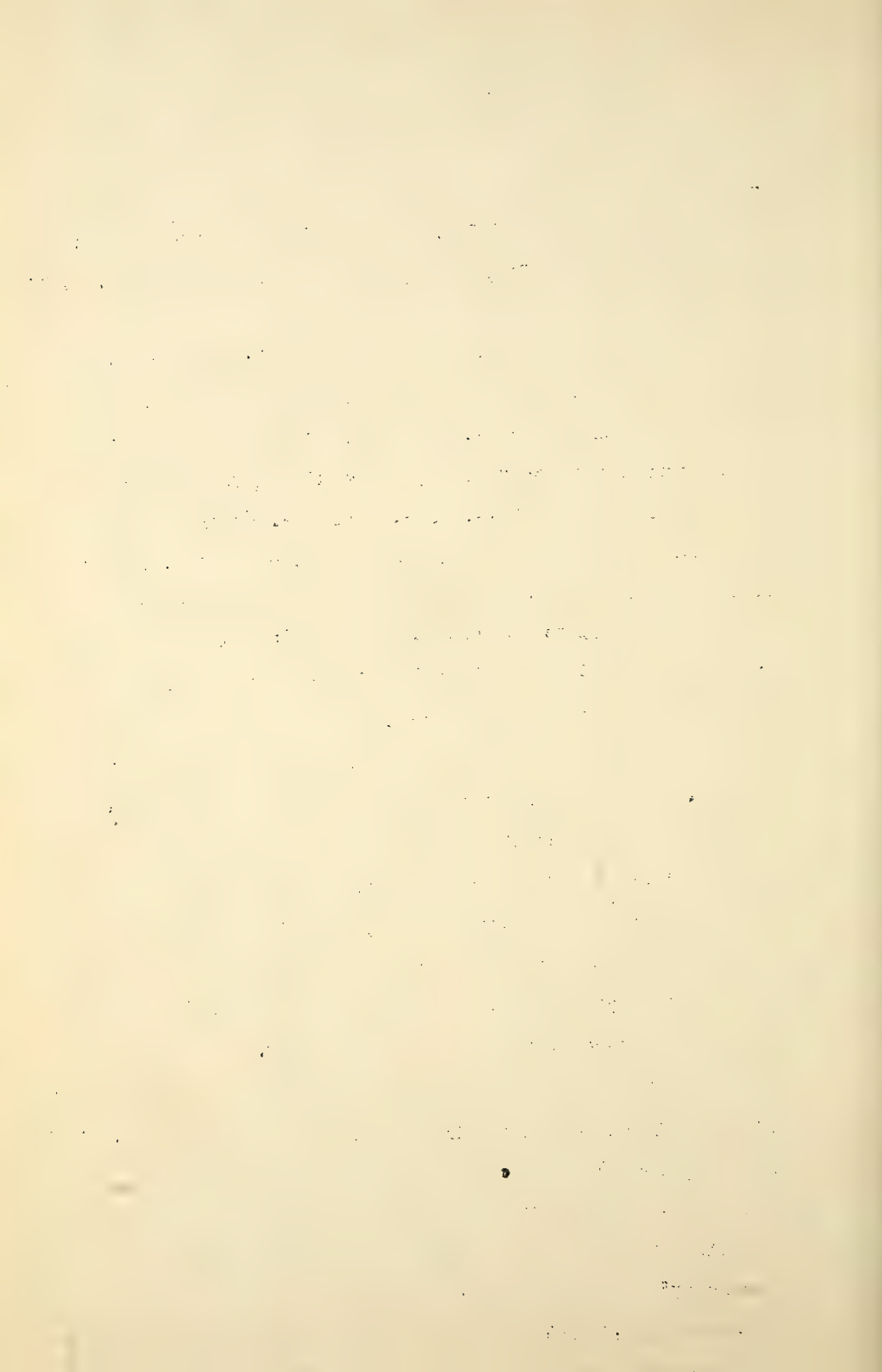
The lease provides that its termination shall be accomplished by service of a written notice personally or by registered mail. Defendant's testimony was that the notice, accompanied by a check, was sent to Mr. Levy by ordinary mail on February 3, 1947, more than sixty days prior to the expressed termination day of the lease. Plaintiff concedes that "if such notice had been received, it wouldn't be material whether it was registered or not, but when it is not received, such registration becomes very important to corroborate and confirm that such a letter was written on February 3rd and mailed." Plaintiff further states that there was nothing to prevent defendant from preparing such a letter, destroying the original, retaining a copy and claiming that the original had been mailed. Notice sent by mail, if actually received, is sufficient, and this has been held to be true although the lease requires notice by registered mail, the latter provision being merely intended to

insure delivery. 51 C J S, p. 611, Landlord and Tenant;
East Eighty Second Street Corporation v. Rogers, 183 N. Y. S.,
297.

Plaintiff asserts that defendant's answer does not state a defense. The answer denies the material allegations of the amended complaint. Plaintiff did not move to strike the answer or any part of it, or require defendant to make the answer more specific. Par. 3 of Sec. 42 of the Civil Practice Act states that all defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived. Plaintiff's present objection, not expressed in the trial court, relates to the form of the answer and not to its substance.

Plaintiff did not establish the allegation of her complaint that defendant violated the covenant of the lease that he shall not suffer nor commit any waste and shall keep the premises, together with the fixtures and appurtenances, in good repair at his own expense, and yield the premises back to the lessor upon termination of the lease in the same condition as at the time of the execution thereof, loss by fire and reasonable wear and tear excepted.

Plaintiff calls attention to the affidavit of merits filed by defendant in the Municipal Court on October 6, 1947, reciting that "no notice of termination was necessary" under the lease, and the sworn answer to the original complaint in the Circuit Court reciting that "no notice of termination was necessary" under the lease, and asserts that if the letter of February 3, 1947, were sent, as claimed, defendant would not have sworn that no notice of termination was necessary



under the lease. The affidavit of merits in the Municipal Court alleged: "Although the defendant on many occasions during said rental term and more than sixty days before the ending thereof had personally and in writing notified the said Simon L. Levy of his intention to vacate said premises and deliver up possession, thus terminating said original letting." The answer to the original complaint in the Circuit Court contains a similar allegation. The answer to the amended complaint pleads the sending by mail of the notice of February 3, 1947. Defendant had a right to maintain that a notice was sent and also that no notice was required. He had a right to state his defenses in the alternative. We are of the opinion that the issue of fact as to whether the notice of February 3, 1947 was received by plaintiff's assignor was properly submitted to the jury. We cannot say that the verdict as to that issue is against the manifest weight of the evidence.

We do not agree with the argument of plaintiff that the trial judge committed prejudicial error in the admission and exclusion of testimony and documentary evidence, or in the giving or refusal of instructions. It follows that we cannot hold, as urged by plaintiff, that the court erred in overruling her motion for a new trial or in denying her motion for a judgment notwithstanding the verdict.

The April, 1947 rent is due and plaintiff is entitled to a judgment therefor. The judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to enter a judgment for the plaintiff and against the defendant for \$35.00.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND P.J., AND NIEMEYER, J. CONCUR.

348 I.A. 391
2



45634

PEOPLE OF THE STATE OF ILLINOIS
ex rel. FRANCES M. GRAY, JOSEPH
A. GRANDE, PHILIP FREGEAU, MARY
C. SMITH, MARGUERITE O'SHEA,
JAMES A. GRIFFIN, MARGARET
DONOHUE, JOHN P. O'SHEA, PETER
SCHLADER, BEATRICE CAFFREY,
ARTHUR E. WIES, FRANKLYN V. BABB,
HELEN YERGER,

Appellees,

v.

STEPHEN E. HURLEY, CHARLES A.
LAHEY and ALBERT W. WILLIAMS,
Civil Service Commissioners of
the City of Chicago; JAMES S.
OSBORNE, Secretary and Chief
Examiner, Chicago Civil Service
Commission,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

The Commissioners and the Secretary and Chief Examiner of the Civil Service Commission of the City of Chicago appeal from a judgment awarding a writ of mandamus commanding them to cancel and expunge the call of the Commission for an original examination for the position of Director of School Attendance of the Board of Education of the City of Chicago, and the examination held September 9, 1950 pursuant to that call, and further commanding them to call a promotion examination restricted to truant officers in the classified civil service.

The Director of School Attendance directs the division of school attendance according to the policies of the Board of Education and the school attendance laws of the State of Illinois; creates optimum school attendance

...

the 1990s, the number of people in the world who are under 15 years of age is expected to increase by 1.2 billion, from 1.1 billion in 1990 to 2.3 billion in 2010. The number of people aged 65 and over is expected to increase by 1.1 billion, from 0.4 billion in 1990 to 1.5 billion in 2010. The number of people aged 15-64 is expected to increase by 1.1 billion, from 1.1 billion in 1990 to 2.2 billion in 2010. The number of people aged 65 and over is expected to increase by 1.1 billion, from 0.4 billion in 1990 to 1.5 billion in 2010. The number of people aged 15-64 is expected to increase by 1.1 billion, from 1.1 billion in 1990 to 2.2 billion in 2010.

...

by administering the division according to the most modern generally accepted principles of the social sciences, in cooperation with public and private schools, law enforcement agencies, as well as with other social and community agencies, and directs the division in interpreting causes for nonattendance, assuming leadership in attempting removal of these causes, and in invoking legal sanctions where required. In furtherance of these objectives he supervises and coordinates the truant officer personnel assigned to the schools throughout the city. Truant officers investigate all cases of truancy or nonattendance at school under the direction of the school principal or the director, reporting the result of their investigations and performing such other functions in the enforcement of the school attendance laws as may be required of them. In the civil service classification of positions the director and truant officers are in Branch III (Health and Welfare), Class O (Inspection Service). The director is in Grade 6--Positions involving supervision and control. Truant officers are in Grade 3--Positions of intermediate responsibility. No positions in the division of school attendance have been put in Grade 4--Positions more advanced, with limited authority, or Grade 5--Positions involving authority to direct or regulate.

The duties of the commission with respect to promotions are defined by section 9 of the Cities Civil Service Act (Ill. Rev. Stats. 1951, chap. 24 1/2, par. 47) as follows:

Đến nay, các địa phương đã có nhiều cố gắng trong việc thực hiện các nhiệm vụ được giao, nhất là trong việc thực hiện các nhiệm vụ trọng tâm, trọng điểm, đã đạt được những kết quả đáng khích lệ. Tuy nhiên, vẫn còn một số hạn chế, bất cập, cần tiếp tục khắc phục, nâng cao hiệu quả công tác quản lý, điều hành.

THE UNIVERSITY OF CHICAGO PRESS

J. Biol. Chem. 267:1098-1103, 1992

THE UNIVERSITY OF CHICAGO

• *Journal of the American Medical Association*, 1990; 263: 1111-1112.

...and the other side of the mountain.

1900 1901 1902 1903 1904 1905 1906 1907 1908 1909 1910 1911 1912 1913 1914 1915 1916 1917 1918 1919 1920 1921 1922 1923 1924 1925 1926 1927 1928 1929 1930 1931 1932 1933 1934 1935 1936 1937 1938 1939 1940 1941 1942 1943 1944 1945 1946 1947 1948 1949 1950 1951 1952 1953 1954 1955 1956 1957 1958 1959 1960 1961 1962 1963 1964 1965 1966 1967 1968 1969 1970 1971 1972 1973 1974 1975 1976 1977 1978 1979 1980 1981 1982 1983 1984 1985 1986 1987 1988 1989 1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718

• 2000

• • •

191

10. $\frac{1}{2} \log 2$

•

1935

"The commission shall, by its rules, provide for ~~promotions~~ in such classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination ***."

Pursuant to the direction of the statute the commission, by section 2 of Rule V of its rules and regulations, requires that

"The Commission in its notices of examination shall define lines of eligibility for ~~promotion~~, specifying by title of position the particular rank or grade entitled to take such promotion examination."

Under the statute and the rules of the commission promotion has been confined to advancement in the same line of employment---those positions in the various departments the duties of which are so related to the duties of the higher place that a thorough knowledge of them is in a degree preparatory for the duties of the higher position. People v. Errant, 229 Ill. 56. The commission must decide whether a promotion examination should be called and who are eligible to take it. In the instant case the commission has acted. It has called an original examination, held the examination and posted the names of the successful persons.

In People v. Errant, supra, an original examination had been held for the position of assistant superintendent of streets in charge of street and alley cleaning. An action in mandamus was instituted to compel the calling of a promotional examination limited to ward superintendent. The court stated that the ultimate question to be decided was

The following information was obtained from the records of the
 Department of the Interior, Bureau of Land Management, and the
 Bureau of Reclamation, and is being furnished to you for your
 information. It is to be understood that this information is
 being furnished to you for your information only, and is not
 to be used for any other purpose.

whether it was the duty of the commissioners to hold a promotional examination, and, if so, whether the duty was of that clear and undoubted legal character which is enforceable by mandamus. We are confronted with the determination of a like question. In the Errant case the ward superintendents performed the same duties in their respective wards that the assistant superintendent performed in the city, and it was shown that there was a striking similarity in the questions used in the examinations for the position. The court held that the legal duty was clear and the writ should issue. The Director of School Attendance supervises a force of approximately 200 truant officers. His duties are executive and administrative. They require a knowledge of the social sciences and cooperation with various organizations throughout the city. The truant officer is essentially an investigator and policeman. He has no supervisory functions, is not obliged to have any knowledge of social science or to work in conjunction with the various organizations with whom the director cooperates. It is doubtful whether the performance of the duties of a truant officer is in any substantial degree preparatory for or tend to fit the truant officer for the duties of director. It cannot be said that the commission acted unreasonably, and therefore arbitrarily. There is not that clear and undoubted legal right in plaintiffs necessary to warrant a writ of mandamus.

None of the plaintiffs took the examination, so they are not in a position to complain as to the character of the examination, the questions asked, or the method and standards of grading those taking the examination.

The judgment is reversed.

REVERSED.

FRIEND, P. J., and BURKE, J., Concur.



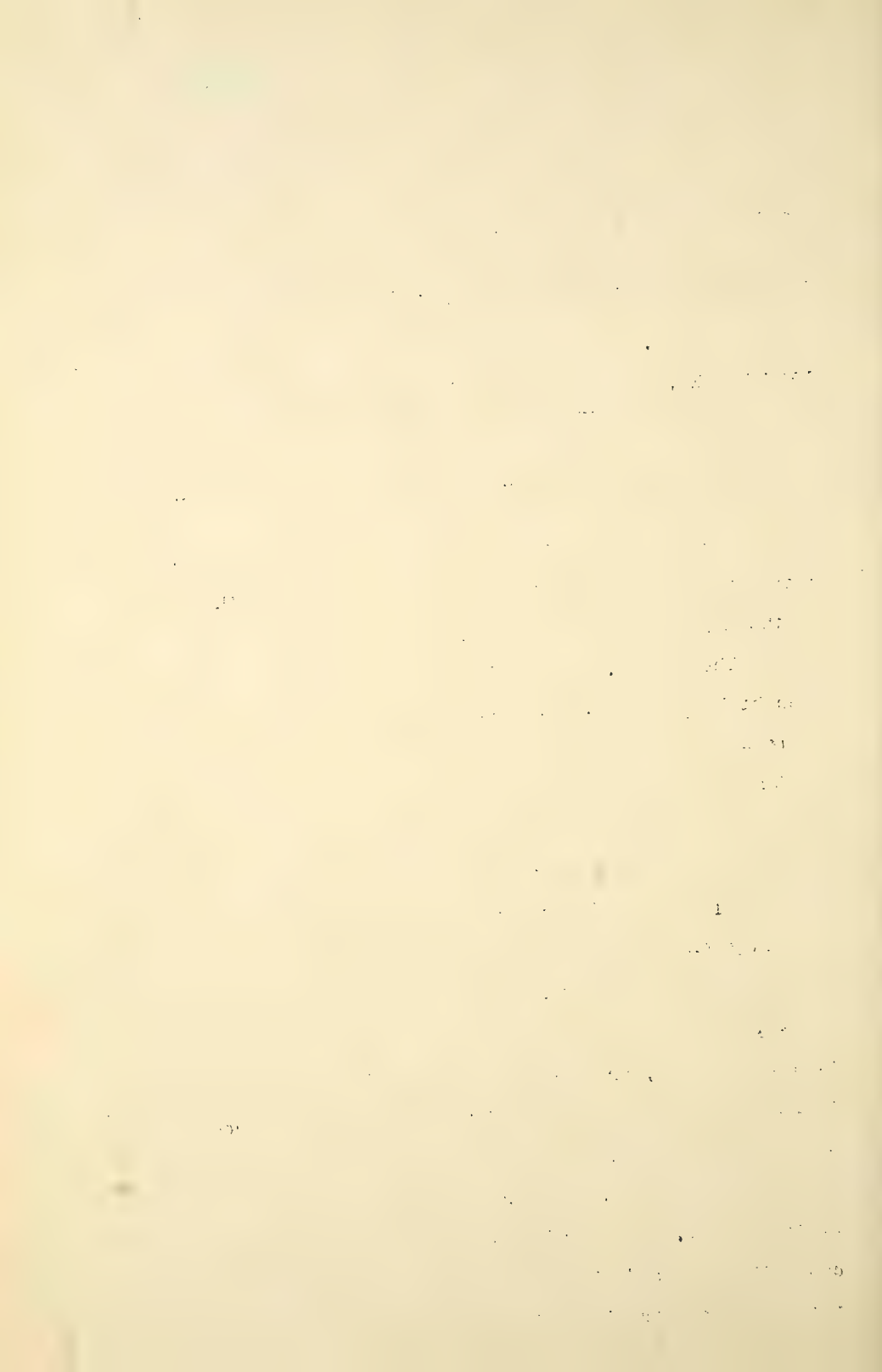
45774

| | | |
|--------------------|---|----------------|
| FRANCES E. LENARD, | } | APPEAL FROM |
| Appellee, | | |
| v. | | SUPERIOR COURT |
| LEON LENARD, | } | COOK COUNTY |
| Appellant. | | |

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order modifying a divorce decree as to the payments to be made by him for the support of two minor children of the parties.

The decree, entered November 2, 1945 in a suit brought by the wife, was amended December 11, 1945 so as to direct defendant to pay \$10 weekly for each child. On January 8, 1948 plaintiff filed a petition to modify the decree as altered on December 11, 1945 by directing the defendant to pay a considerably larger sum for the support of plaintiff and her children. Defendant answered the petition and the matter was referred to a master, who made a report finding that "there is no evidence whatever as to plaintiff's needs or expenditures for the support of the children, or as to any increased needs in connection therewith." He further found that defendant's income had not increased substantially since 1945. No objections were filed to the report. The trial court affirmed the findings of the master. Some oral testimony was presented in open court over the objection of defendant and an order was entered increasing the payments to be made by defendant



for each child's support from \$10 to \$16 a week. Later an order was entered allowing plaintiff \$100 for her attorney's services in procuring the increased allowance. From these orders defendant has appealed.

No objections having been filed to the master's report, no question of fact is open to review on this appeal. Decatur Coal Co. v. Clokey, 332 Ill. 253, 260. When a cause is referred to a master in chancery to report conclusions of law and fact, all the evidence must be introduced before him, and on the hearing of exceptions to his report or the hearing of the cause no other evidence will be heard. Central Ill. Pub. Serv. Co. v. Swartz, 284 Ill. 108. The court erred in receiving testimony in open court. The right of a court to modify a divorce decree as to alimony or support money for children of the parties after the term is dependent upon a change of conditions of the parties, the needs of the children and the bettered financial circumstances of the defendant. Smith v. Smith, 334 Ill. 370. The court therefore erred in modifying the decree and increasing the weekly payments to be made by defendant for support of his children. The order allowing attorney's fees was based upon the false premise of the right of plaintiff to an increased allowance for the support of the children. It is erroneous. Newman v. Newman, 69 Ill. 167; Ehrhardt v. Ehrhardt, 198 Ill. App. 47.

The orders appealed from are reversed.

ORDERS REVERSED.

FRIEND, P. J., and BURKE, J., Concur.

•

2

1000

...and the *Journal of the American Medical Association* (JAMA) has been the most influential journal in the field of medicine for over a century.

5203

1. *Chlorophyll a* (Chl *a*)

•

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1601 UV-Visible Spectrophotometer. The concentration of chlorophyll was expressed in $\mu\text{g mL}^{-1}$.

45791

ILLINOIS APPLETON & COX, INC., a
corporation,

Plaintiff below,

v.

MELTON CARR, et al.,

Defendants below.

On Appeal of MELTON CARR,

Appellant,

v.

NORTHERN ILLINOIS CORPORATION, a
corporation, Defendant below,

Appellee.



APPEAL FROM

CIRCUIT COURT

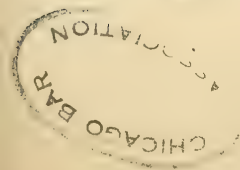
COOK COUNTY.

348 I.A. 393
1

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Carr, defendant in a suit of interpleader, appeals from a decree finding his co-defendant, Northern Illinois Corporation (hereinafter called Northern Illinois), to be the owner of and entitled to \$12,485, paid into court by the interpleader plaintiff.

Carr, a motor truck carrier, obtained possession of a fleet of trucks and trailers under conditional sales agreements entered into with Bartels Motor Sales. Motor Sales sold the sales agreements and the promissory notes for the unpaid purchase price of the equipment executed in accordance with the provisions of the sales agreements, to a finance corporation. Some of these transactions were refinanced, that is, new conditional sales agreements and promissory notes for the unpaid purchase price were executed



the first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the
the twenty-sixth is the fact that the
the twenty-seventh is the fact that the
the twenty-eighth is the fact that the
the twenty-ninth is the fact that the
the thirtieth is the fact that the
the thirty-first is the fact that the
the thirty-second is the fact that the
the thirty-third is the fact that the
the thirty-fourth is the fact that the
the thirty-fifth is the fact that the
the thirty-sixth is the fact that the
the thirty-seventh is the fact that the
the thirty-eighth is the fact that the
the thirty-ninth is the fact that the
the fortieth is the fact that the
the forty-first is the fact that the
the forty-second is the fact that the
the forty-third is the fact that the
the forty-fourth is the fact that the
the forty-fifth is the fact that the
the forty-sixth is the fact that the
the forty-seventh is the fact that the
the forty-eighth is the fact that the
the forty-ninth is the fact that the
the fiftieth is the fact that the
the fifty-first is the fact that the
the fifty-second is the fact that the
the fifty-third is the fact that the
the fifty-fourth is the fact that the
the fifty-fifth is the fact that the
the fifty-sixth is the fact that the
the fifty-seventh is the fact that the
the fifty-eighth is the fact that the
the fifty-ninth is the fact that the
the sixtieth is the fact that the
the sixty-first is the fact that the
the sixty-second is the fact that the
the sixty-third is the fact that the
the sixty-fourth is the fact that the
the sixty-fifth is the fact that the
the sixty-sixth is the fact that the
the sixty-seventh is the fact that the
the sixty-eighth is the fact that the
the sixty-ninth is the fact that the
the seventieth is the fact that the
the seventy-first is the fact that the
the seventy-second is the fact that the
the seventy-third is the fact that the
the seventy-fourth is the fact that the
the seventy-fifth is the fact that the
the seventy-sixth is the fact that the
the seventy-seventh is the fact that the
the seventy-eighth is the fact that the
the seventy-ninth is the fact that the
the eightieth is the fact that the
the eighty-first is the fact that the
the eighty-second is the fact that the
the eighty-third is the fact that the
the eighty-fourth is the fact that the
the eighty-fifth is the fact that the
the eighty-sixth is the fact that the
the eighty-seventh is the fact that the
the eighty-eighth is the fact that the
the eighty-ninth is the fact that the
the ninetieth is the fact that the
the ninety-first is the fact that the
the ninety-second is the fact that the
the ninety-third is the fact that the
the ninety-fourth is the fact that the
the ninety-fifth is the fact that the
the ninety-sixth is the fact that the
the ninety-seventh is the fact that the
the ninety-eighth is the fact that the
the ninety-ninth is the fact that the
the hundredth is the fact that the

and the old contracts and notes were canceled and marked "Paid by renewal." Carr got possession of the tractor and trailer involved herein under conditional sales agreements dated, respectively, October 14, 1947 and April 27, 1948. He never paid the full purchase price of this equipment and it was the subject of conditional sales agreements (the last being dated June 11, 1948) throughout the entire period of the transactions before us. Each of these agreements and renewals thereof contained a provision requiring him as purchaser to keep the equipment insured against "fire, theft and collision, payable to and protecting seller for not less than the total amount owing on said note until fully paid." Under date of March 13, 1948 Carr procured an insurance policy, issued by the interpleader plaintiff on behalf of certain underwriters of Lloyds, London, insuring Carr as the insured named therein against loss by reason of damage to certain vehicles scheduled therein, including the tractor and trailer herein as a result of accidental collision or upset. The policy contained a loss payable clause providing that loss, if any, should be adjusted only with the insured and Northern Illinois Finance Corporation, DeKalb, Illinois (a defendant herein and hereinafter referred to as Finance Corporation), as their respective interests may appear. Under date of June 11, 1948 Carr refinanced certain tractors and trailers he had previously obtained from the Motor Sales, including the tractor and trailer involved herein, by canceling all previous notes and conditional sales contracts, entering into a new contract and executing a new promissory note payable to seller in the amount of \$160,372.08.

On August 23, 1948, while the tractor and trailer herein involved were being driven down a mountain near Baker, California, the driver lost control of the tractor and the tractor and trailer left the highway and dropped a number of feet to the side of the mountain, resulting in extensive damage. November 29, 1948, Carr by power of attorney authorized the officers of Northern Illinois to "negotiate, settle and sign all necessary papers and contracts" to adjust the insurance loss of the damaged tractor and trailer. The loss was adjusted for \$12,500 and a draft for that amount payable to Carr and Northern Illinois was delivered to Carr. He returned the draft and insisted upon payment of the full sum to himself. The complaint of interpleader was filed. Carr, Finance Corporation and Northern Illinois were made defendants. Answers were filed. Carr and Northern Illinois stated their respective claims to the fund. Finance Corporation denied any claim to the fund, asserted that Northern Illinois was the owner and quitclaimed to Northern Illinois all its right and title thereto. Carr also filed a counterclaim against Northern Illinois. By consent of the defendants a decree was entered directing the payment of the \$12,500, less plaintiff's costs of \$15, into court, and that "defendants interplead between themselves to determine their rights with respect to the sum of money to be paid, as aforesaid, by plaintiff to the clerk of this court." Thereafter Carr's counterclaim was transferred to the law docket and the "issues raised by the bill of interpleader and the answers thereto", were referred to a master in chancery. The master reported,

12

•

finding Northern Illinois to be the owner of and entitled to the fund. Objections and exceptions to the report were overruled and a decree was entered in conformity with the report of the master. Carr appeals.

Carr's first contention urged on appeal is that under the decree of interpleader, which "ordered, adjudged and decreed that the defendants interplead between themselves to determine their rights ***, " it was incumbent upon each claimant to file a further pleading setting up his or its claim to the fund; that Northern Illinois, having failed to file another claim, the court should have directed the fund to be paid to Carr. "Interplead" does not mean merely to "file a claim to the fund," as contended by Carr. It is defined in the Century Dictionary as "in law, to litigate with each other in order to determine who is the original claimant." In defining "interpleader" the same authority says "The court usually allows *** the claimants to interplead—that is, to proceed to trial against each other." The issue of the claimants to the fund or property is formed by their answers to the complaint for interpleader. Morrill v. Manhattan Life Ins. Co., 183 Ill. 260, 268. So far as we are advised it has never been the practice for claimants to file further pleadings except to correct defects in or amplify their answers to the complaint. The trial court followed the usual practice when he referred to the master in chancery "the issues raised by the bill of interpleader and the answers thereto."

Carr's second contention is that Northern Illinois is not entitled to the fund because it failed to comply with section 22 of the Civil Practice Act (Ill. Rev. Stat., 1951, chap. 110, par. 146) requiring an assignee of a nonnegotiable chose in action to allege in his pleading on oath that he is the actual bona fide owner thereof and set forth how and when he acquired it. This objection should have been made by motion to strike the answer of Northern Illinois before the consent decree directing Carr and Northern Illinois to answer was entered. The point was made for the first time in Carr's objection to the master's report finding Northern Illinois to be the owner of the fund. At that time there was sworn testimony in the record which showed how and when the Northern Illinois acquired the conditional sales agreement and convinced the master and the trial court and, as will hereinafter be shown, this court, that Northern Illinois was the bona fide owner of the agreement, the note and the fund in controversy. This objection cannot be sustained.

Carr's third contention is that the damage to the tractor and trailer was not caused by a collision within the meaning of the conditional sales agreement, which required the purchaser to keep the equipment insured against fire, theft and collision for the protection of the seller. We are not disposed to give a narrow or technical meaning to the word collision. We are not required to distinguish between a collision and an upset. The word collision should be given a broad meaning consistent with the intent of the parties in providing insurance for the protection of the seller—to make the seller whole if his property should be

damaged in the possession of the buyer, to substitute the insurance money for the subject matter of the conditional sale--not to enrich the buyer at the expense of the seller. It is not disputed that the driver lost control of the tractor; that the tractor and trailer left the highway. Carr made no effort to produce the driver. The damage resulted not from leaving the highway but from contact with hard and resisting objects, such as earth, rocks, trees, etc., after leaving the highway. It is immaterial whether this occurred in the upsetting of the tractor and trailer or when they were upright. It was a collision, an ordinary risk of travel on the highway--the use for which the tractor and trailer were intended. Carr recognized that the damage arose from a contingency against which he was obligated to insure when he authorized the officers of Northern Illinois to settle and adjust the claims against the insurance company. In equity and good conscience he cannot be permitted to abandon this practical construction of his contractual liability in favor of one prompted by a desire of self-enrichment.

The right of Northern Illinois to the fund in controversy does not depend upon the reformation of the insurance policy, the sales contract, the assignment of the sales contract or any or either of them. In 1942 the name of the then existing Northern Illinois Finance Corporation was changed to Northern Illinois Corporation. That corporation is defendant herein and claimant to the fund. Thereafter Northern Illinois, apparently to preserve the name, caused

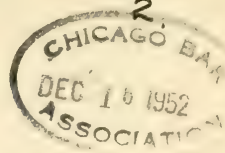
the incorporation of a new corporation under the name Northern Illinois Finance Corporation. That corporation, owned and controlled by Northern Illinois, is also a defendant herein. It claims that it transacts no business. Whether it does is immaterial. It makes no claim to the fund. There is evidence that forms of the old Finance Corporation are used by Northern Illinois, the word "Finance" in the corporate name being stricken. There is evidence, fully supporting the findings of the master, that Northern Illinois purchased from the Motor Sales the conditional sales agreements and notes executed by Carr; that Carr made payments to Northern Illinois and, as heretofore mentioned, authorized the officers of Northern Illinois to adjust and settle the damage claim under the insurance policy by the terms of which the loss was payable to Carr or the Finance Corporation. Carr was and still is indebted to Northern Illinois greatly in excess of the amount involved herein. Mistake in the name of the corporation in the loss payable clause is immaterial. Malleable Iron Range Co. v. Pussey, 244 Ill. 184; Fletcher, Cyc. of Corporations, Vol. 6 (1950 Rev. Vol. 1) Sec. 2443. Other points raised by Carr need not be discussed. None can be sustained. The rights, if any, of Carr arising out of the subsequent seizure of the motor equipment covered by the conditional sales agreement and the sale of same, which is the subject matter of Carr's counterclaim against Northern

Illinois, must be determined in the trial of that action. Northern Illinois is plainly entitled to the fund involved herein.

The decree is affirmed.

AFFIRMED.

FRIEND, P. J., and BURKE, J., Concur.



45803

SUBURBAN MOTOR FREIGHT, INC.,
a corporation,

Appellee,

v.

DARLING & COMPANY, a corpora-
tion,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$816.52 rendered against it in a trial by the court for the amount claimed to be due as the balance of charges for transportation of "beef and pork bones" from Indianapolis, Indiana to Chicago, Illinois by plaintiff, a motor freight carrier.

The case was heard upon a stipulation of facts and oral testimony. The single question to be determined is whether the bones shipped should be charged for at the rate on "meat bones" or at the rate on "bones NOI" --bones not otherwise indexed. Defendant paid the rate on "bones NOI". If the bones should be classified as "meat bones" it should pay the amount of the judgment. Twenty-six shipments were made in May, 1949. According to the stipulation the shipments consisted of "all bones from the bodies of both beef and pork which is the waste product of trimmed meats, that is, beef head bones, ribs or pork head bones and especially the hind feet of pork, as well as other various bones trimmed from the bodies of the animals. *** The amount of meat contained in the shipments of the bones would be only the particles of meat clinging to the bone from the trimming room which cannot

be readily removed. There are no other pieces or scraps of meat included in these shipments. After the trailer is completely filled with the bones they are sprayed with a kerosene mixture with black oil sprayed over the top layer. This is to prevent the attraction of insects as well as to insure that the merchandise is denatured for human consumption.

*** Separate weights are maintained on all the bones that constituted the shipment. The separate weights are classified as "cattle bones," "cutting room bones," "green pork bones," "pig feet bones." The bones were described as "pork and beef bones" in the bills of lading. The packing house at which the shipments originated attached to each bill of lading a certificate that "The following described inedible meat products *** has been denatured or otherwise rendered unavailable for other food purposes and is offered for shipment in interstate or foreign commerce for industrial use exclusively." The international motor freight classification does not contain a description or definition of "meat bones" or "bones NOI."

The testimony shows that perishability, loading characteristics, density, susceptibility to loss and damage, value, need for special handling and whether the product is intended for human consumption or not, are considered in arriving at the rate to be charged. Perishable items have a higher rate than nonperishable items. A product intended for human consumption would have a still higher rating. The rate applicable to "meat bones" is lower than on meat intended for human consumption.

1000

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

$f(x) = \int_0^x \frac{1}{1+t^2} dt$. It is shown that $f(x)$ is an increasing function and that $f(x) < \frac{\pi}{2}$ for all x .

2. In the second part, we consider the function $g(x) = \int_0^x \frac{t}{1+t^2} dt$. It is shown that $g(x)$ is an odd function and that $g(x) < \frac{\pi}{2} x$ for all x .

3. The third part of the paper is devoted to the study of the function $h(x) = \int_0^x \frac{t^2}{1+t^2} dt$. It is shown that $h(x)$ is an even function and that $h(x) < \frac{\pi}{2} x^2$ for all x .

4. In the fourth part, we consider the function $k(x) = \int_0^x \frac{t^3}{1+t^2} dt$. It is shown that $k(x)$ is an odd function and that $k(x) < \frac{\pi}{2} x^3$ for all x .

5. The fifth part of the paper is devoted to the study of the function $l(x) = \int_0^x \frac{t^4}{1+t^2} dt$. It is shown that $l(x)$ is an even function and that $l(x) < \frac{\pi}{2} x^4$ for all x .

6. In the sixth part, we consider the function $m(x) = \int_0^x \frac{t^5}{1+t^2} dt$. It is shown that $m(x)$ is an odd function and that $m(x) < \frac{\pi}{2} x^5$ for all x .

7. The seventh part of the paper is devoted to the study of the function $n(x) = \int_0^x \frac{t^6}{1+t^2} dt$. It is shown that $n(x)$ is an even function and that $n(x) < \frac{\pi}{2} x^6$ for all x .

8. In the eighth part, we consider the function $o(x) = \int_0^x \frac{t^7}{1+t^2} dt$. It is shown that $o(x)$ is an odd function and that $o(x) < \frac{\pi}{2} x^7$ for all x .

9. The ninth part of the paper is devoted to the study of the function $p(x) = \int_0^x \frac{t^8}{1+t^2} dt$. It is shown that $p(x)$ is an even function and that $p(x) < \frac{\pi}{2} x^8$ for all x .

10. In the tenth part, we consider the function $q(x) = \int_0^x \frac{t^9}{1+t^2} dt$. It is shown that $q(x)$ is an odd function and that $q(x) < \frac{\pi}{2} x^9$ for all x .

11. The eleventh part of the paper is devoted to the study of the function $r(x) = \int_0^x \frac{t^{10}}{1+t^2} dt$. It is shown that $r(x)$ is an even function and that $r(x) < \frac{\pi}{2} x^{10}$ for all x .

12. In the twelfth part, we consider the function $s(x) = \int_0^x \frac{t^{11}}{1+t^2} dt$. It is shown that $s(x)$ is an odd function and that $s(x) < \frac{\pi}{2} x^{11}$ for all x .

13. The thirteenth part of the paper is devoted to the study of the function $t(x) = \int_0^x \frac{t^{12}}{1+t^2} dt$. It is shown that $t(x)$ is an even function and that $t(x) < \frac{\pi}{2} x^{12}$ for all x .

14. In the fourteenth part, we consider the function $u(x) = \int_0^x \frac{t^{13}}{1+t^2} dt$. It is shown that $u(x)$ is an odd function and that $u(x) < \frac{\pi}{2} x^{13}$ for all x .

15. The fifteenth part of the paper is devoted to the study of the function $v(x) = \int_0^x \frac{t^{14}}{1+t^2} dt$. It is shown that $v(x)$ is an even function and that $v(x) < \frac{\pi}{2} x^{14}$ for all x .

16. In the sixteenth part, we consider the function $w(x) = \int_0^x \frac{t^{15}}{1+t^2} dt$. It is shown that $w(x)$ is an odd function and that $w(x) < \frac{\pi}{2} x^{15}$ for all x .

17. The seventeenth part of the paper is devoted to the study of the function $x(x) = \int_0^x \frac{t^{16}}{1+t^2} dt$. It is shown that $x(x)$ is an even function and that $x(x) < \frac{\pi}{2} x^{16}$ for all x .

18. In the eighteenth part, we consider the function $y(x) = \int_0^x \frac{t^{17}}{1+t^2} dt$. It is shown that $y(x)$ is an odd function and that $y(x) < \frac{\pi}{2} x^{17}$ for all x .

19. The nineteenth part of the paper is devoted to the study of the function $z(x) = \int_0^x \frac{t^{18}}{1+t^2} dt$. It is shown that $z(x)$ is an even function and that $z(x) < \frac{\pi}{2} x^{18}$ for all x .

20. In the twentieth part, we consider the function $a(x) = \int_0^x \frac{t^{19}}{1+t^2} dt$. It is shown that $a(x)$ is an odd function and that $a(x) < \frac{\pi}{2} x^{19}$ for all x .

21. The twenty-first part of the paper is devoted to the study of the function $b(x) = \int_0^x \frac{t^{20}}{1+t^2} dt$. It is shown that $b(x)$ is an even function and that $b(x) < \frac{\pi}{2} x^{20}$ for all x .

22. In the twenty-second part, we consider the function $c(x) = \int_0^x \frac{t^{21}}{1+t^2} dt$. It is shown that $c(x)$ is an odd function and that $c(x) < \frac{\pi}{2} x^{21}$ for all x .

23. The twenty-third part of the paper is devoted to the study of the function $d(x) = \int_0^x \frac{t^{22}}{1+t^2} dt$. It is shown that $d(x)$ is an even function and that $d(x) < \frac{\pi}{2} x^{22}$ for all x .

24. In the twenty-fourth part, we consider the function $e(x) = \int_0^x \frac{t^{23}}{1+t^2} dt$. It is shown that $e(x)$ is an odd function and that $e(x) < \frac{\pi}{2} x^{23}$ for all x .

25. The twenty-fifth part of the paper is devoted to the study of the function $f(x) = \int_0^x \frac{t^{24}}{1+t^2} dt$. It is shown that $f(x)$ is an even function and that $f(x) < \frac{\pi}{2} x^{24}$ for all x .

26. In the twenty-sixth part, we consider the function $g(x) = \int_0^x \frac{t^{25}}{1+t^2} dt$. It is shown that $g(x)$ is an odd function and that $g(x) < \frac{\pi}{2} x^{25}$ for all x .

27. The twenty-seventh part of the paper is devoted to the study of the function $h(x) = \int_0^x \frac{t^{26}}{1+t^2} dt$. It is shown that $h(x)$ is an even function and that $h(x) < \frac{\pi}{2} x^{26}$ for all x .

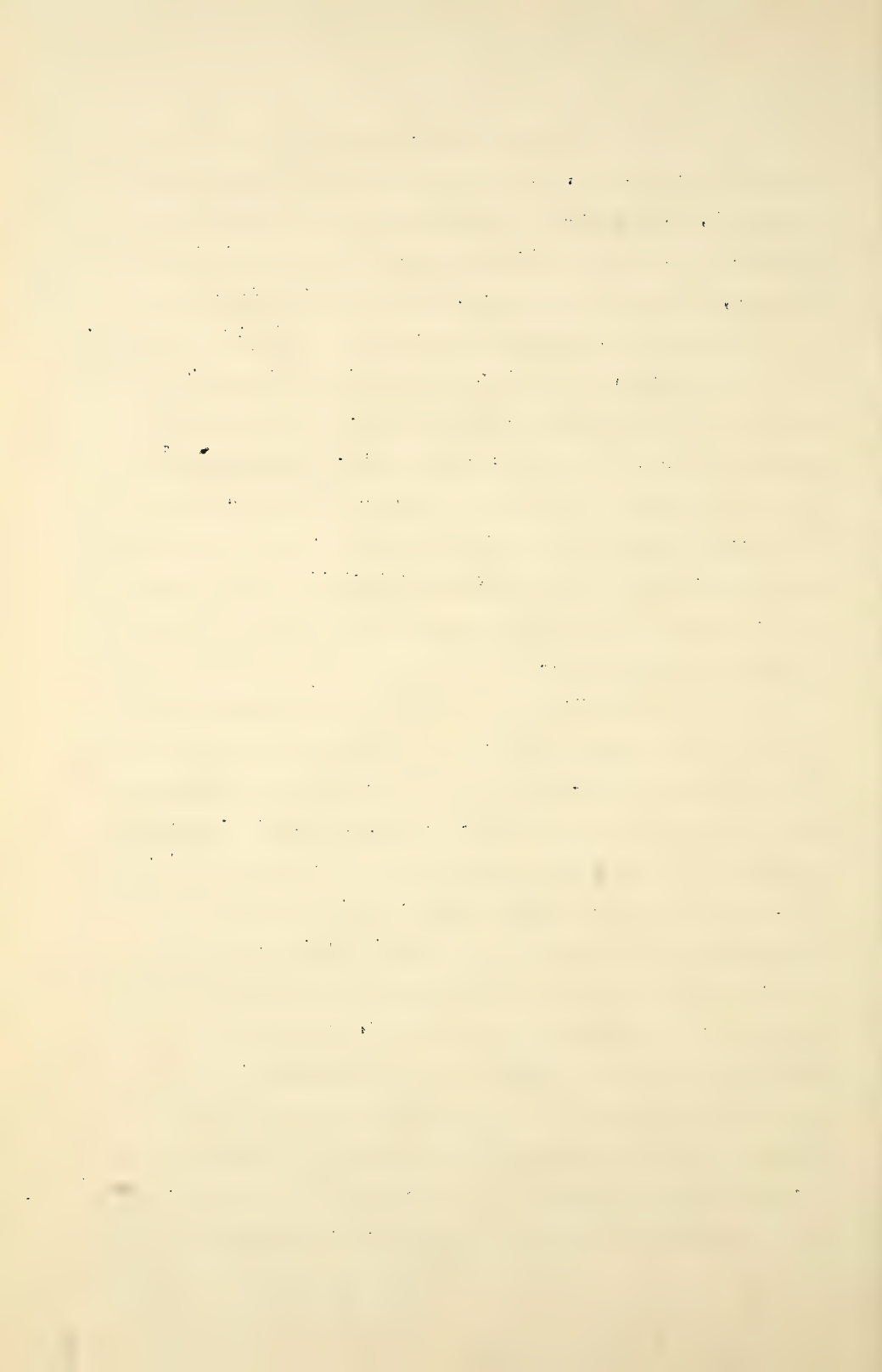
28. In the twenty-eighth part, we consider the function $i(x) = \int_0^x \frac{t^{27}}{1+t^2} dt$. It is shown that $i(x)$ is an odd function and that $i(x) < \frac{\pi}{2} x^{27}$ for all x .

29. The twenty-ninth part of the paper is devoted to the study of the function $j(x) = \int_0^x \frac{t^{28}}{1+t^2} dt$. It is shown that $j(x)$ is an even function and that $j(x) < \frac{\pi}{2} x^{28}$ for all x .

30. In the thirtieth part, we consider the function $k(x) = \int_0^x \frac{t^{29}}{1+t^2} dt$. It is shown that $k(x)$ is an odd function and that $k(x) < \frac{\pi}{2} x^{29}$ for all x .

Defendant is a processor of animal waste. It manufactures fertilizers, glue, bone meal, dried meat scraps, bread oil, stearic acid and glycerine. The bones in the shipments involved herein were intended for the manufacture of glue, grease and bone meal. For these purposes it is not at all necessary that any meat or marrow be left on the bone. It is necessary that the bones be delivered within about ten hours after leaving the packing houses. They require no special handling, such as refrigeration. The phrase "green bones" was used by defendant's witness in the sense of "unprocessed bones." The traffic managers of the respective parties differed as to the construction to be placed upon the motor freight tariff. Each testified in support of the claims of his employer.

No federal case applicable to the issue presented has been cited. Holdings of the Interstate Commerce Commission are persuasive only, but in the absence of other authorities are entitled to great weight. In Morris & Co. v. Director General, 73 Interstate Commerce Commission Reports 137, decided in 1922, the complainants, engaged in the packing house business, alleged that the rates charged on shipments of fresh meat bones in carloads between certain points were illegal and unreasonable. The bones, intended to be used for soup, were shipped in bulk under refrigeration. The carriers required complainants to bill the bones as fresh meat and assessed the rates applicable on fresh meat notwithstanding the fact that the tariff specifically rated bones not otherwise indexed by name on a lower basis and that fresh meat bones



or soup bones were not otherwise named in the tariff. The commission held that the charge should be at the rate for "bones not otherwise indexed by name." In respect to a newly published item providing an increased rating on fresh meat bones, the commission said:

"In justification of this increase they rely largely upon the fact that these bones are used in the manufacture of food for human consumption and require special care in handling; that they move in refrigerator cars, while ordinary bones move in box or open cars; and that they are more valuable than the ordinary bones used in the manufacture of glue, fertilizer, and glycerin. *** While defendants might be justified in maintaining rates on fresh-meat bones slightly higher than on other bones, there is no justification for the maintenance of higher rates on bones of the character here under consideration than on packing-house products."

In Hygrade Food Products Corp. v. Fort Worth & D. C. Ry. Co., 279 Interstate Commerce Commission Reports 485, decided in 1950, the complainant, engaged in the meat packing business, complained of the rates charged for shipments billed under one or another of the following descriptions: Green animal bones, fresh bones, bones, fresh animal bones, animal bones, or fresh meat bones. These shipments were consigned to a soup manufacturer to be used in the making of soup, and moved in refrigerator cars. The bones were perishable. The complainant contended that the charge should be based on the rate for bones not otherwise identified by name; that the product shipped was not "meat bones" but are "fresh animal bones" or "green animal bones," neither of which were otherwise indexed by name in the Western Classification (and that the tariff did not contain a commodity description "meat bones.") The commission held that the shipment consisted of fresh meat bones, and said:

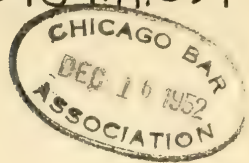
"The test to determine the essential characteristics of a product is not the generic classification of the product, but rather the descriptive usages which have become attached to the product for transportation purposes. Patterson Foundry & Machine Co. v. Chicago B. & Q. R. Co., 262 I. C. C. 339, 343, by division 2. In Morris & Co. v. Director General, 73 I. C. C. 137, division 3 used the term fresh meat bones to designate bones that had been trimmed clean of meat and which were to be used in the manufacture of soup."

Under the holding in the Morris case the bones in the shipments before us were not meat bones. The proper rate to be charged, therefore, was the rate on "bones NOI" --not otherwise indexed. The court erred in fixing the rate at the higher charge for "meat bones."

The judgment is reversed.

REVERSED.

FRIEND, P. J. AND BURKE, J., Concur



45790

THOMAS A. HUGHES,

Plaintiff - Appellee,

v.

CHICAGO TRANSIT AUTHORITY, a Municipal
Corporation,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for the plaintiff in the amount of \$6,000. Defendant has appealed.

Plaintiff on February 28, 1948 about 6:30 p.m. was injured while alighting from defendant's streetcar at Belmont and Crawford Avenues in Chicago. He was 63 years of age at the time and had ridden west from Racine Avenue as a passenger, after finishing his work day as a cigar maker and drinking two ten ounce glasses of beer at a tavern.

Implicit in the verdict is a finding that defendant was negligent in maintaining an icy, snowy, or slippery condition on the step of the rear platform of the streetcar, or in moving the streetcar while plaintiff was alighting, or both. Plaintiff stated on oral argument that the essential issue was the movement of the streetcar. However, either finding properly made is sufficient to support the verdict. No point is made here of lack of due care. The only question is whether the findings of negligence are against the manifest weight of the evidence.

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

1679

LONDON

Printed by J. B.

at the Sign of the Gun

in St. Dunstons Church

1679

Printed by J. B.

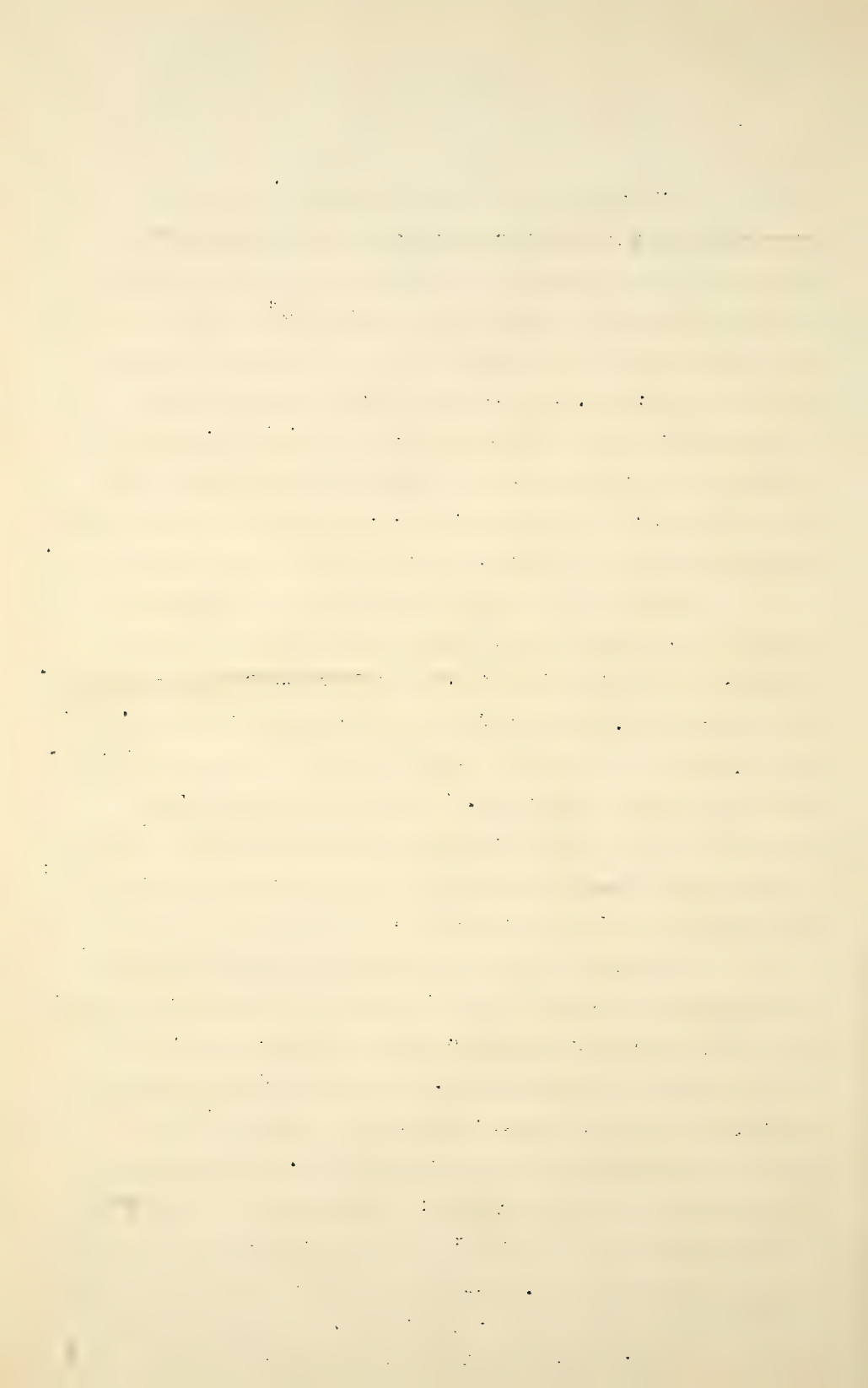
1679

We see no merit in the defendant's contention that the evidence with respect to the snowy, icy condition should be rejected because the fact was physically impossible. A certified "Monthly Climatological Summary" by the United States Department of Commerce was put in evidence. It showed that up to 6:30 p.m. on February 28, 1948 temperature on that day did not reach the freezing point; that .23 inches of rain fell the morning of that day; and that no unmelted snow was on the ground at 6:30 p.m. Defendant argues that this shows conclusively no snow or ice could have been on the step.

There is no physical law which would render impossible an accumulation of packed snowy ice on the car step at 6:30 p.m.; February 28th, 1948. Mannen v. Morris, 338 Ill. 322; Briney v. Illinois Central R. R. Company, 330 Ill. App. 250. Neither is there an inherent improbability in the fact. Smith v. Illinois Cent. R. Co., 343 Ill. App. 593. The Summary data was taken at the Municipal Air Port, and witnesses for the defendant testified about snow having fallen, the wet platform, and "slop" in the car.

The plaintiff himself was the only witness that testified to the occurrence in his behalf. Defendant had four occurrence witnesses, the conductor, the motorman, and two passengers on the streetcar. The testimony of witnesses on both sides on the issue would justify the jury's inference that plaintiff's testimony was credible. His testimony was that the step was "very icy"; had a "hunk of snowy ice where I stepped down"; and the "ice was yellow and black and dirty and was packed down." We think the finding would not be against the manifest weight of the evidence.

With respect to the movement of the car, the jury may have disregarded the testimony of the conductor that he



helped plaintiff off and saw plaintiff take 2 or 3 steps over and then turn about and come back to about where he stepped off and "crumbled," and that during this time he gave no signal to start. They may have considered improbable his story that he had not given the starting signal though the passengers who had preceded plaintiff had gotten off, and the conductor saw no one waiting to board. They may have disregarded the inconsistent testimony of the motorman and the conductor with respect to signals while the lights changed from red through green to red again. They may have discounted the impeaching statement signed by plaintiff whose testimony indicated that the statement was given early in his stay at the hospital and that he did not remember saying the car was still when "he flew into the street from the platform." The jury may have inferred that the fireman and the boy, who were occurrence witnesses for the defendant, did not recall the incident as clearly as plaintiff since they differed as to details with each other, and with the conductor, although they both testify that the car had not moved after it stopped. We think a finding that the car moved, as plaintiff testified, would not be against the manifest weight of the evidence.

We conclude therefore that the verdict and judgment was not against the manifest weight of the evidence. The decision in Mareno v. Chicago Transit Authority, 342 Ill. App. 443 does not militate against this conclusion because here there is more than the mere uncorroborated testimony of the plaintiff.

AFFIRMED.

LEWE, P.J., AND FEINBERG, J., CONCUR.

the first of these is the fact that the
 the second is the fact that the

third is the fact that the

fourth is the fact that the

fifth is the fact that the

sixth is the fact that the

seventh is the fact that the

eighth is the fact that the

ninth is the fact that the

tenth is the fact that the

eleventh is the fact that the

twelfth is the fact that the

thirteenth is the fact that the

fourteenth is the fact that the

fifteenth is the fact that the

Publish B. J. Dewey

3481.A.545

Abstract



Gen. No. 10613

Agenda 15

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1952

| | | |
|--|---|------------------|
| In the Matter of the Petition for the |) | |
| Detachment of All of Sections Eighteen (18), |) | |
| * Nineteen (19), Seven (7) and Six (6), All |) | Appeal from the |
| in Township Thirty-two (32) North, Range |) | |
| One (1) East of the Third Principal |) | Circuit Court of |
| Meridian, La Salle County, Illinois, from |) | |
| Hopkins Township High School District No. |) | La Salle County. |
| 536, Putnam and La Salle Counties, Illinois, |) | |
| and Its Annexation to Tonica Community |) | |
| High School District No. 360, La Salle |) | |
| County, Illinois. |) | |

ANDERSON -- J.

Hopkins Township High School District No. 536 of Putnam and La Salle Counties maintains a high school in Granville, Illinois. Their territory all lies in Putnam County except 4 sections of land in controversy here. This land is situated in La Salle County.

Tonica Community High School District No. 360 of La Salle County maintains a high school in the Village of Tonica, Illinois. The two high school buildings are about ten miles apart. The west boundary of the Tonica High School District is practically identical to that of the east boundary of the ^{Hopkins} ~~Granville~~ High School District.

On August 19, 1949 a Petition was filed with the County Superintendent of Schools of La Salle County, Illinois, asking that sections 6, 7, 18, and 19, Township 32 N. R. 1 East of 3rd P. M. be detached from the Hopkins High School District and annexed to the Tonica High School District. On August 22, 1949 the Superintendent of Schools of La Salle County set the hearing date on the

Petition for September 1, 1949. On August 31, 1949 Homer V. Harn, a resident and legal voter living within the 4 sections of land above mentioned, filed a Petition for detachment identical in form to the one heretofore mentioned and prayed that his name be added to the original Petition. This second Petition was filed on August 31, 1949. The original Petition was signed by thirty-six voters residing upon the lands sought to be detached. On August 31, 1949, four petitioners who had signed the original Petition for detachment and who had later filed a withdrawal Petition, requested that their names be stricken from the withdrawal Petition. On September 1, 1949, before the hearing on the detachment Petition, these same four voters with nine others, all of whom had signed the original Petition, filed their withdrawal Petition and asked that their names not be considered as signers of the original Petition. The County Superintendent of Schools of La Salle County, after hearing the testimony, held that the Petition and proof complied with the Statute and granted the Petition permitting the detachment. The proceedings were reviewed pursuant to sections 10-18 of the School Code by the Circuit Court of La Salle County, Illinois, which held that the detachment of the 4 sections of land by the County Superintendent of Schools of La Salle County was contrary to the law and the evidence. Certain interested parties, appellants herein, have appealed.

The first question to be considered is whether or not there were a sufficient number of voters who signed the original Petitions to confer jurisdiction. The detachment Petition is based on sections 10-17 of the School Code. (Ill. Rev. Stat., 1949, ch. 122, secs. 10-17.) The pertinent provisions of this section of the Statute so far as the sufficiency of the Petition is concerned are: the Petition must be signed by at least two-thirds of the voters residing within the territory proposed to be detached; the petition may consist of two or more identical petitions each signed by different voters. It is conceded by all the parties that at the time of the hearing before the Superintendent of Schools there were forty-one voters residing in the territory sought to be detached; that two-thirds of such voters would be twenty-eight. It is also

conceded that the Petition had twenty-six valid signatures that should be counted.

Appellants contend that the signature of Homer V. Harnß, whose Petition was not filed until August 31, should have been counted. It is further uncontroverted that one of the signatures on the original Petition was designated and signed "Mrs. Thorsen." Appellants contend that her name should be counted. Appellees contend that neither of the above mentioned names should be counted. In order to make the Petition comply with the Statute both of these names must be counted. If they are not counted, petitioners have not filed a Petition consisting of two-thirds of the legal voters residing in the territory sought to be detached. In other words the Petition must contain twenty-eight names and it is necessary that both the names of Homer V. Harnß and Mrs. Thorsen be counted to confer jurisdiction of the Petitions.

The law in this State is settled that voluntary subscribers to a petition for the organization of a school district or for change of boundary of such a district have a right to withdraw their names from such petitions at any time before it is finally acted upon. (People vs. Kramer, 397 Ill. 592.) In the Kramer case and the other cases reviewed therein, the Statutes construed make no provision for withdrawal of names from petitions. The Statute here makes no such provision. It is conceded that the Petition of Homer V. Harnß was in proper form, identical to that of the first Petition filed. It was filed before the original Petition was acted upon.

Appellees concede that the subscribers to the Petition had a right to withdraw their names but urge that this does not give validity to a Petition added to the original Petition as was Harn's Petition. They urge that the sufficiency of the Petition is purely statutory and that strict compliance with the Statute is required. Since the Courts have permitted withdrawals without benefit of Statute, we see no logical reason why names of petitioners should not be permitted to be added and the same filed as was done with the Harn's

Petition. We have not been able to find any case exactly in point. Hansmeyer vs. Indian Creek Drah. Dist., 284 Ill. 458 is somewhat analagous. That case involved a petition for the formation of a drainage district. Before the formation of a drainage district another petition was filed by adjacent landowners asking that the district be enlarged and that their signatures have the same effect as if they had signed the original petition. The Supreme Court held that the second petition was valid and was just the same as if the petitions had been filed in duplicate in which case they would have constituted a single petition. It is true in that case that the law permitted amendments to the petition but the reasoning of the case should be applied here. In our opinion the proper construction of the Statute permitted the Harn's Petition to be treated as a duplicate petition and his name should have been counted in the same manner as the other original petitioners and the Circuit Court erred in refusing to do so.

The next question presented is whether or not the name "Mrs. Thorsen" should be counted. In Schmidt vs. Thomas, 33 Ill. App. 109, it was held that a default judgment against a person summoned as "Mrs. Schmidt" was not valid. The Court says: "...It seems superfluous to cite authority that the abbreviation 'Mrs.' is not a name, yet it has been so decided. Elberson v. Richards, 42 N. J. Law 69." The only proof disclosed by the record in the instant case is shown by the testimony of Ralph Foote who testified as to the identity of "Mrs. Thorsen" on behalf of the petitioners that there were forty-one legal voters in the territory involved and that one of the legal voters was "Mrs. Otto Thorsen." There was no attempt to show the identity of Mrs. Thorsen in any other manner. So far as the record discloses there may have been another "Mrs. Thorsen" living on the land involved who was not "Mrs. Otto Thorsen." "Mrs. Thorsen," who ever she was, did not testify before the Superintendent of Schools nor is her identity in any way established. This was permitted and done by the people themselves whose signatures were questioned in Messman vs.

High School District No. 150, 379 Ill. 32. The name "Mrs. Thorsen" is not a valid signature on the Petition and should not have been counted. Without it there appear to be but twenty-seven names on the Petition. The Petition was therefore short one of the jurisdictional number of twenty-eight. The Petitions did not comply with the Statute, and the order of the Superintendent of Schools of La Salle County in permitting the detachment of the lands involved is void.

Appellees further argue that regardless of the validity of the Petition as to the number of signers the evidence in the record does not sustain the findings of the County Superintendent that the land in question should be detached from the Hopkins Township High School and that the judgment of the Circuit Court reversing the County Superintendent's order is correct. Appellants urge otherwise.

Section 6 of the land involved is at the north end of the territory and sections 7, 18, and 19 are below section 6. The tract in question is a rectangle one mile wide and four miles long. The lands are all flat with no streams or other barriers across them. It appears that sections 6, 7, and one-half of 18 are closer to the Hopkins High School than to the Tonica High School. Section 19 and the south one-half of section 18 are closer to the Tonica High School. It is not controverted that all of the area is equally accessible by school busses from either school. The roads are all well maintained and the only difference in reaching one school or the other from the territory involved is a few minutes time. Ralph Foote, a director of the Hopkins High School, testified on behalf of the petitioners that one-half of the territory involved is more conveniently located so far as distance is concerned to the Tonica High School and the other one-half to the Hopkins High School. He further testified that the roads to the Hopkins High School are just as good as those to the Tonica High School.

Charles Robinson testified that he is a member of the Board of Education of the Hopkins High School and that the territory is not any more accessible to Tonica High School than to Hopkins High School except the part of the territory geographically closer to Hopkins. Sections 10-17 of the School Code above mentioned further provide that the territory may only be detached if "The High School of the annexing district is more reasonably located as to comfort and convenience of the high school pupils of the territory sought to be detached than is the location of the High School of the district from which such territory is sought to be detached." This provision of the above Statute was construed in *Husser vs. Fouth*, 386 Ill. 188. The Supreme Court there held that the power given to the superintendent of schools to grant or refuse to grant a petition to detach school lands from one district to another was not a delegation of legislative or judicial power and that the Statute was constitutional. The Court in effect held that the County Superintendent was given no alternative but was required to grant or refuse the prayer of the petition and that his decision was reviewable by the Courts. Sections 10-18 of the School Code provide that the Circuit Court upon application of any interested party may review all questions of law or fact assigned as error for review. While the Statute does not provide how it is to be reviewed it appears to us by analogy to other cases that the question to be determined by the reviewing Circuit Court is whether the order of the County Superintendent had substantial foundation in evidence or was against the manifest weight of the evidence. The words of the Statute by implication require this. It appears to us that the same rule of law should apply to the findings here as are applied in cases arising under the Workmen's Compensation Act. In those cases as here the Commission is not a judicial or legislative body. In effect they are an administrative body whose findings of fact and conclusions of law may be reviewed in the manner above indicated. (*Le Tourneau, Inc., vs. Indus. Com.*, 396 Ill. 435.)

It is singular in the instant case that no testimony was introduced showing

that the comfort and convenience of the pupils living in the territory required a detachment. The primary purpose in permitting a detachment is that the annexing district is more reasonably located for the comfort and convenience of the pupils. In our opinion the meagre testimony does not in any way establish the requirements of the Statute. The testimony of Ralph Foote discloses that one-half of the territory involved was as conveniently located to Hopkins High School as to Tonica High School. The Circuit Court properly found that the order of the Superintendent of Schools permitting the detachment was without substantial foundation in evidence and was against the manifest weight of the evidence. The Circuit Court was correct in reversing the County Superintendent's order of detachment.

In view of our conclusions, it is unnecessary to pass on the other assignments of error of the appellants.

This opinion was filed September 18, 1952. On November 20, 1952 the Supreme Court announced in *Louis A. Dolan, et al. vs. Clifford Whitney, et al.*, not yet reported, that in as much as the Legislature as of July 1, 1952 repealed the sections of the School Code on which this proceedings is based, all pending litigation has abated, and the only appropriate order here is to dismiss this appeal. The appeal is thereby dismissed accordingly.

Appeal dismissed,

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of April, in the year of our Lord one thousand nine hundred and sixty-nine.

John E. Hall
Clerk of the Appellate Court.



45753

| | | |
|-------------------------------------|---|----------------|
| ANNA BOULAHANIS, GEORGE BOULAHANIS, |) | |
| a minor, by his mother and next |) | |
| friend, BESSIE BOULAHANIS, NICK |) | |
| BOULAHANIS, a minor, by his mother |) | APPEAL FROM |
| and next friend, BESSIE BOULAHANIS, |) | |
| and LARRY GIANARIS, by his mother |) | CIRCUIT COURT, |
| and next friend, TULA GIANARIS, |) | |
| Appellees, |) | COOK COUNTY. |
| |) | |
| v. |) | |
| |) | |
| THE GREAT ATLANTIC & PACIFIC TEA |) | |
| COMPANY, a corporation, |) | |
| Appellant. |) | |

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION
OF THE COURT.

This is an appeal from judgments entered by the trial court for \$155 in behalf of each of the four plaintiffs based upon jury verdicts. Attorneys for plaintiffs filed no brief. The cause of action as to each plaintiff was separate. The complaint consisted of two counts in each of which the four plaintiffs joined:

Count I claimed that Anna Boulahanis purchased a can of "Sunny Brook Alaska Red Salmon" (Bessie Boulahanis in fact made the purchase) from defendant on or about November 26, 1947, for herself and members of her family; that defendant impliedly warranted that the salmon was pure, wholesome and free from any impurity; that the can of salmon was served to the plaintiffs who consumed the same, as a result of which they became violently ill because of certain impurities then and there present in the can of salmon, and because it was unwholesome resulted in a breach of warranty. Damages of \$5,000 are claimed for each plaintiff.

Count II alleged the same facts. In addition, plaintiffs charged defendant with various acts of negligence. Because of lack of proof the court directed a verdict as to this count at the close of plaintiffs' case.

Defendant contends that the court erred in not granting defendant's motion for directed verdicts or judgments notwithstanding the verdict on the grounds that (1) there was inadequate evidence to sustain the findings of the jury upon which the judgments were based, and (2) no causal connection is shown between the eating of the salmon and the subsequent illness of the plaintiffs.

To pass on these contentions it is necessary to analyze the evidence. Summarized, it shows that one Bessie Boulahanis purchased a can of Sunny Brock salmon at one of defendant's stores on November 26, 1947; that she served it to her two children and a nephew, who are the minor plaintiffs, and her mother-in-law, the other plaintiff, that evening at about six o'clock with fresh lemon juice. She did not eat any of the salmon herself. She stated that the can had a fresh label on it. It was not rusty or bulged. There were no dents or leaks in it. When she opened it she did not remember any gas escaping when she placed it in the dish for consumption. There was no undue coloring and she observed nothing wrong with it. In a statement which she gave to the company prior to the trial she stated that nothing appeared to be wrong with the can. No mention was made that it was blackened. At the trial

she stated the can was black around the inside in the bottom. All four plaintiffs became sick about five minutes after eating the salmon. While lemon juice and a little bread were served with it, none of the plaintiffs ate the bread but had merely water and salmon. The three minor plaintiffs for breakfast on that day had toast and milk. The other plaintiff had coffee and one egg. All four plaintiffs had a cheese sandwich for lunch and nothing more. The three minor plaintiffs were actively engaged all day in playing foot-ball, follow-the-leader and other vigorous sports.

Within five minutes after the salmon was eaten, all the plaintiffs became ill. They had stomach cramps and vomited violently. A Dr. William Nestos, about one hour after plaintiffs became sick, treated all of them and used a stomach pump. He attended the three children over the week-end each day and they went to see him several times after. Plaintiff Anna Boulehanis was confined to her bed for two weeks. All four plaintiffs, as a result of the illness, had the same complaint--that now when they eat too much they can't hold it. Joyce McEacheron, the book-keeper at defendant's store where the salmon was purchased, testified that on November 13, 1947, Bessie Boulahanis complained that "one of her kids got sick" from eating salmon, and that she received no other complaints about salmon. This is substantially the testimony introduced at the trial.

A reading of these facts brings into focus that there was no evidence in the record that the can was rusty or that it was bulged; that there was no undue odor detected when

100

1. *Chlorophyll a* and *Chlorophyll b* were determined by the method of Arar and Collins (1971) using a Shimadzu 1601 UV-Visible Spectrophotometer.

Journal of Management Studies, 19(1), 67-80.

•

•

it was opened; that the four plaintiffs, who had only a very light breakfast and only a cheese sandwich each for lunch, ate the entire contents of the can and that nothing apparently was wrong. Nevertheless, within five minutes after eating it, all four became sick with the same identical symptoms. They were attended by their family doctor within an hour who pumped their stomachs. He did not testify. The burden was upon plaintiffs to establish by competent evidence the poisonous or unwholesome condition of the food. Bowman v. Woodway Stores, 345 Ill. 110; Walraven v. Sprague Warner & Co., 292 N. W. 883. This they did not do.

We are of the opinion that the verdicts were against the manifest weight of the evidence. The judgments are reversed and the cause is remanded with directions to allow defendant's motion for a new trial.

Judgments reversed and cause
remanded with directions.

Schwartz and Luby, JJ., concur.



348 I.A. 547
1.

45770

In the Matter of the Estate
of STANLEY W. MIGALA,
Deceased.

APPEAL FROM

JOHN T. HOHBERGER, Individually
and doing business as Hohberger
Manufacturing Co.,

CIRCUIT COURT,
COOK COUNTY.

Petitioner below,

Appellee,

v.

STELLA MIGALA, Individually and
as Administratrix of the Estate
of Stanley W. Migala, Deceased,

Respondent below,

Appellant.

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE
COURT.

Petitioner filed his petition in the Probate Court of Cook County under section 187a of the Probate Act (Ill. Rev. Stat. ch. 3, par. 339a) seeking to recover a candy making machine sold by him to the decedent, Stanley W. Migala. The petition alleged that the machine was sold on June 24, 1947 and that the decedent, on March 11, 1950, gave petitioner his promissory note for \$2,300, balance then due on the machine, which note was payable monthly and secured by a chattel mortgage. Decedent died on March 23, 1951 without having paid any part of the interest or principal due upon said note, and at the time of the filing of the petition it is alleged that the sum of \$2,402.20 was due. An answer was filed by the respondent administratrix denying jurisdiction of the court over the person of Stella Migala as administratrix and in her individual capacity, and alleging

~~which she owned~~ that the machine had become attached to the real estate in such manner as to become a part thereof and that she in her personal capacity had purchased the property on which the machine was located a few weeks after the death of her husband. / Thereafter a trial was had before a judge of the Probate Court of Cook County and an order was entered finding that the court had jurisdiction of the parties and the subject matter, that the machine was personal property conveyed by the decedent to the petitioner by way of chattel mortgage, and that the sum of \$2,300, with interest, was due on the mortgage note. An order was thereupon entered granting leave to the petitioner to repossess the machine.

An appeal was taken to the Circuit Court of Cook County and after a trial before the court the appeal of the respondent in her individual capacity was dismissed, the court holding that she, individually, was not a ~~proper~~ party to the proceedings and not affected by the order of the Probate Court. The court found that the machine was personal property and that the chattel mortgage was a valid lien thereon, and affirmed the order of the Probate Court. Subsequently an appeal was taken to the Supreme Court of this State challenging the constitutionality of section 187a of the Probate Act and urging further the contentions made here, that the Probate Court had no jurisdiction of the subject matter and therefore its order was void, and that the machine became attached to the real estate and was

therefore part of the real estate entitled to pass to the respondent in her individual capacity by reason of her purchase of the real estate.

Inasmuch as the Supreme Court by transferring the case here has held that no constitutional question is involved, we proceed to an analysis of the issues upon the assumption that section 187a of the Probate Act is valid and binding on the parties hereto. The section provides as follows:

"Personal Property Claimed by Third Party.) Upon the filing of a verified petition therefor by any person and upon such notice as the court may direct, the probate court may order an executor, administrator, guardian, or conservator having in his possession or control any personal property, book of account, paper, or evidence of title to land or of debt which belongs to the petitioner, to deliver the same to the petitioner or his agent. The court may hear the evidence offered by any party, may determine all questions of title, claims of adverse title, and the right of property, and may enter such orders and judgment as the case requires. Upon the demand of any party to the proceeding, questions of title, claims of adverse title, and the right of property shall be determined by a jury."

Although respondent filed a lengthy brief and urges a number of points upon this court, in our opinion the entire matter is controlled by a determination of whether the machine in question was real or personal property. If it were personal property, the court had authority under section 187a to enter the order in question. Moreover if it were personal property the respondent in her individual capacity acquired no interest in the chattel by virtue of her purchase of the real estate upon which it was located. The fact that the administratrix did

1. The first part of the report is a general introduction to the subject.

2. The second part is a detailed description of the methods used in the study.

3. The third part is a discussion of the results of the study.

4. The fourth part is a conclusion and a summary of the findings.

5. The fifth part is a list of references.

6. The sixth part is a list of figures and tables.

7. The seventh part is a list of appendices.

8. The eighth part is a list of footnotes.

9. The ninth part is a list of acknowledgments.

10. The tenth part is a list of the author's address and contact information.

11. The eleventh part is a list of the author's previous work.

12. The twelfth part is a list of the author's current work.

13. The thirteenth part is a list of the author's future work.

14. The fourteenth part is a list of the author's publications.

15. The fifteenth part is a list of the author's awards and honors.

16. The sixteenth part is a list of the author's memberships in professional organizations.

17. The seventeenth part is a list of the author's contacts.

18. The eighteenth part is a list of the author's references.

19. The nineteenth part is a list of the author's figures and tables.

20. The twentieth part is a list of the author's appendices.

21. The twenty-first part is a list of the author's footnotes.

22. The twenty-second part is a list of the author's acknowledgments.

23. The twenty-third part is a list of the author's address and contact information.

24. The twenty-fourth part is a list of the author's previous work.

25. The twenty-fifth part is a list of the author's current work.

26. The twenty-sixth part is a list of the author's future work.

27. The twenty-seventh part is a list of the author's publications.

not claim the machine as an asset of the estate and that it was not inventoried as such is of no significance inasmuch as section 187a permits the filing of a petition by any person claiming an interest in the property. Nor does the fact that it was not claimed or inventoried by the administratrix change the essential character of the property. If it were personal property it should have been inventoried, and the failure of the administratrix to so proceed should not be permitted to interfere with the rights of third persons claiming an interest in the property.

We come to the material question as to whether or not the finding of the trial court that the machine was personal property was based upon competent evidence. The proof established that the machine in question was installed by petitioner to replace a previous machine located at the identical place where the present machine was placed. The electric power, steam and water connections used by the previous machine were used in connecting the one here involved. The machine was used to make an icing for candy. It was built by the petitioner and conveyed to decedent's plant, knocked down, and installed in seven separate parts. It was set up on four pillars which for some time had been part of the structure. To connect the machine to the pillars, one 5/8-inch bolt was installed in each leg. The electrical installations were made by the decedent. To set up the machine there was but one

1. *Journal of the American Medical Association*, 1997; 277: 1033-1036.

steam connection and one water connection to be made. To disconnect the steam and water lines it was necessary to adjust and loosen one connection. Thereupon the machine could have been disassembled into its seven parts and removed without damage to the premises. The law governing the conversion of personal property into a fixture by annexation is stated in Bank of Republic v. Wells-Jackson Corporation, 358 Ill. 356, at 362:

"The early decisions in England, as well as in this country, were very firm in holding that when personal property became a fixture by annexation to the real estate by some permanent method the personal property lost its identity as such and became real estate. The more modern decisions have broken away from this rule and a more liberal construction is now given in favor of holding fixtures personal property where that intent can be gathered from the conduct or action of the parties. (Sword v. Low, 122 Ill. 487.)"

In the instant case the installation or removal of the chattel in question was a matter of making a few simple manual adjustments, and the machine could easily be disassembled without damage to the building. It is a stronger case on the facts than the case above quoted, where the personal property which was sold on a conditional sales contract consisted of a sprinkler system which was built into the structure. Moreover, it seems clear that the decedent, by executing a chattel mortgage on the machine in question, and the petitioner, by accepting such, indicated an intention to treat the machine as personal property.

Respondent relies upon the case of White Way Sign Co. v. Chicago Title and Trust Co., 368 Ill. 482, where an electric

1891

10. 1990年12月25日，苏联正式解体，俄罗斯联邦成立。

$$C_{\text{eff}} = \frac{C_{\text{eff}}^{\text{max}}}{1 + \left(\frac{C_{\text{eff}}^{\text{max}}}{C_{50}} \right)^n} \quad (1)$$

sign was sold to a theatre company for installation on the Princess Theatre Building in the City of Chicago. The conditional vendors sought to replevin the sign from the owner of the freehold. The court found that the electric sign had become a permanent part of the freehold and denied the claims of the conditional vendor. Largely instrumental in the decision was the fact that the parties had agreed prior to the installation that the canopy and electric sign were to be permanently attached to the realty, an important circumstance which is lacking in the case at bar. Under all the facts and circumstances of the instant case we think the weight of the evidence supports the trial court's finding that the machine in question was personal property.

The orders of the Circuit Court appealed from are affirmed.

Orders affirmed.

Robson, P. J., and Schwartz, J., concur.



348 1.A.547
2.

Gen. No. 10645

Agenda No. 18

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1952

| | | |
|-------------------------------|---|------------------|
| LIN SPEERS AND GLADYS SPEERS, |) | Appeal from the |
| Plaintiffs-Appellees.) |) | |
| vs. |) | Circuit Court of |
| |) | |
| CHARLES WEDEKIND AND JANET |) | Ogle County. |
| WEDEKIND, |) | |
| Defendants-Appellants.) |) | |

ANDERSON -- J.

Lin Speers and Gladys Speers, his wife, plaintiffs appellees, filed their suit in the Circuit Court of Ogle County, Illinois against Charles Wedekind and Janet Wedekind, his wife, defendants appellants, for damages claimed due them for breach of contract. The issues were submitted to a jury which rendered a verdict in favor of the plaintiffs for \$750.00. After the defendants' motion for a new trial was denied, the Trial Court entered a judgment on the verdict and this appeal follows.

The undisputed facts in the case appear to be that in July, 1951 the parties entered into a written contract wherein the defendants sold the plaintiffs a lunchroom and filling station for the sum of \$5000.00. This combination lunchroom and service station at the time of the sale had been owned and operated by the defendants. The property purchased consisted of the fixtures and merchandise ordinarily used to conduct this type of business. The business was being conducted and had been conducted in a Texaco station at Forreston, Illinois. On the date of the contract the plaintiffs paid the defendants \$2000.00 and took over the operation of the business. The

balance, \$3000.00, was to be paid within thirty days. The balance was not paid and time for payment was extended until September 14, 1951. About September 6, 1951, the plaintiffs notified the defendants that they were going to give up the business and it was orally agreed that an inventory of the property would be taken by the defendants and that the plaintiffs would be given a copy of the same and that the defendants would operate the business until resale by the defendants at which time defendants would pay the plaintiffs all money received over \$3000.00 which the plaintiffs still owed the defendants.

* There was some delay in the inventory and in the intervening time the business was operated by a brother of the defendants until on December 7, 1951 the business was sold by the defendants to Elgin Hicks for \$3400.00. The inventory as of September 13, 1951 was \$3410.48. The inventory taken at the time of the sale to Elgin Hicks was \$3728.58, the difference in inventory arising from the purchase and the sale of merchandise necessary to keep the business in operation. After adjustment of this difference by the defendants they determined that the net amount received by them from the sale was \$3141.75. They deducted the \$3000.00 owed them and tendered a check for \$141.75 to plaintiffs with a written statement of the transaction. Plaintiffs refused to accept the check.

On November 16, 1951 a meeting was held in Oregon, Illinois at the office of attorney Wayne R. Bettner concerning the proposed sale of the business. Bettner represented the plaintiffs. All the parties were present. A discussion was had as to what the present inventory of the business was. Defendants thought it might be \$3400.00, \$3700.00, or \$3800.00. There was some conversation concerning \$3750.00. The rights of the parties largely hinge upon what took place in Bettner's office.

Gladys Speers testified that the defendants told her that if the business brought over \$3750.00 they would pay the plaintiffs all over that sum they might receive from the sale up to \$5000.00, but if it sold for less than

\$3750.00 they would in any event pay \$750.00 to the plaintiffs.

Wayne R. Bettner testified that on the date the parties met in his office Mrs. Wedekind, on the question being discussed as to why the inventory had not been prepared, answered that it was due to the fact that she had been busy. He further testified that Mrs. Wedekind did not know what the inventory would amount to but guessed it would be between \$3500.00 and \$3800.00; that some discussion was had about when the inventory would be finished; that he suggested that the parties agree that the inventory be taken as of \$3750.00 and that all over \$3000.00 be paid to the plaintiffs and in no event should they receive less than \$750.00; that the plaintiffs immediately agreed to this; that defendants were a little reluctant but finally agreed that this would be all right, but payment would have to wait until the business was sold.

Lin Speers testified as to what took place in Bettner's office as follows: that Mrs. Wedekind said that she had not finished the inventory but thought it would amount to around \$3700.00; that she said that she would pay the plaintiffs \$750.00 even if the business sold for less than \$3000.00.

Charles Wedekind testified as to the material and controverted questions of fact as follows: that he had told the Speers when Mrs. Speers had stated that they should get something out of the business that he would resell it for the inventory and give them all over \$3000.00. He denied that he agreed in Bettner's office to pay the plaintiffs \$750.00 regardless of what the business brought.

Janet Wedekind testified that she helped take the inventory of September 13, 1951; that she depreciated the equipment ten percent and the inventory then amounted to \$3410.48. She testified that she did not agree to pay the \$750.00 in any event and said that the inventory might amount to \$3750.00 and that the plaintiffs were welcome to all over \$3000.00 obtained from the resale.

Defendants' motion for a new trial alleged that the verdict was against the weight of the evidence, that it did not support the verdict, and was

contrary to the evidence. It further alleged that the evidence failed to show essential elements to enforce an enforceable contract. The defendants in their brief and argument in this court assigned as error other grounds not contained in their motion for a new trial contending that the court erred in admitting inadmissible evidence offered by the plaintiffs and that the court erred in giving improper instructions and in refusing to give proper instructions to the jury. The Practice Act (Ill. Rev. Stat., 1951, ch. 110, par. 192) provides that if a party desires a new trial, it is necessary for him to file the points in writing, specifying the grounds for the same. The wise purpose of this statute is that if the trial court has committed error, it may cure such error upon it being called to its attention by granting a new trial. Only those errors so alleged in his motion for a new trial may be considered by the reviewing court on appeal and all other errors are deemed waived. (The People vs. Hatcher, 334 Ill. 526; People vs. Amore, 293 Ill. App. 505.) For these reasons the errors alleged concerning the admissibility of testimony and ~~because the court did not properly~~ instructions to the jury cannot be considered by this court. Regardless of this, defendants failed to abstract the testimony or the instructions complained of. Supreme Court rule 38 which also applies to records on appeal to the Appellate Court requires that all instructions as well as testimony claimed improperly admitted or not admitted by the ruling of the trial court be abstracted where error is assigned. It has been held where this is not done, errors assigned will not be considered. (Binger vs. Baker, 326 Ill. App., 2d Dist., 639; City of Roodhouse vs. Christian, 158 Ill. ¹³⁷ ~~138~~.) The appellants' failure to abstract testimony and instructions complained of prevents us from considering the above assigned errors.

Defendants urge as error that the evidence did not make out a cause of action as a matter of law and that the supplemental agreement between the parties which changed the original agreement was without consideration. One reason this contention fails is that the agreement made after the original sale between the parties was an entirely different one. The original agree-

ment had been executed except for the payment of the balance of the consideration and the parties had a right to make any agreement they saw fit concerning the balance of the purchase price or the resale of the premises. It is apparent they did make such an agreement and the only controversy, if any, is as to the amount the plaintiffs were to receive from the resale of the business. This contention is not tenable.

The last contention of the defendants that the verdict is against the manifest weight of the evidence likewise has no merit. The verdict could reasonably be sustained by the evidence of the plaintiffs and Wayne R. Bettner and there is nothing so improbable or unreasonable in their testimony that the jury would not have been justified in believing that the defendants had agreed to pay the plaintiffs out of the resale of the business not less than \$750.00. The jury evidently believed this testimony and did not believe the testimony of the defendants on this subject. The credibility of the witnesses was for the jury to determine. The testimony on which this verdict is based supports the verdict and it cannot be said that the verdict is manifestly against the weight of the evidence.

For the above reasons the judgment entered by the trial court was correct and that judgment is accordingly affirmed.

Judgment affirmed,

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of April, in the year of our Lord one thousand nine hundred and sixty-nine.

John E. Hall
Clerk of the Appellate Court.



348 I.A. 548

45755

HENRY APPEL,
Appellee,

v.

THORNTON C. JEGEN and THORNTON
R. JEGEN

THORNTON R. JEGEN,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

March 15, 1951 defendant Thornton R. Jegen, then a minor, was found guilty by verdict of a jury, of the negligent driving of his father's automobile, injuring Henry Appel, plaintiff. Damages were assessed at \$2000.00, and judgment entered on the verdict, from which defendant appeals.

The essential facts disclose that on the evening in question plaintiff, an elderly man, rode with his family physician, Dr. Edward Smith, to the corner of 113th street and Michigan avenue to have a prescription for his sick grandchild filled at the drugstore. The doctor, driving east on 113th street, stopped his car about five feet and one-car length from the stop light on the southwest corner of the intersection, and let plaintiff out at the south curb. Plaintiff then walked to the rear of the doctor's car before he started to cross the street. He was about thirty-five feet west of the stop light at that time, and walked northeast toward the northwest corner of the intersection, passing in the path of Jegen's car which

[illegible]

200 200 200 200

was proceeding in a westerly direction along 113th street.

The sole point urged as ground for reversal is that plaintiff was not in the exercise of due care for his own safety, and that his contributory negligence was the proximate and sole cause of the injury. Plaintiff testified that there were no automobiles on 113th street as he locked up and down and started out across the street in a north-easterly direction heading for the drugstore on the corner.

"I didn't see any car between Michigan avenue and where I was after I came out from behind Dr. Smith's car. *** When I crossed in back of Dr. Smith's car as I crossed over 113th I saw no car going east on 113th street because I came right behind the car. I couldn't see it. *** I didn't see any cars in the two center lanes when I came from behind Dr. Smith's car because I got out of my car and there was no car behind him and I didn't look. There was one in the front. I didn't look at that."

Andrew Klein, called by defendant, testified that he was walking east on the north side of 113th street and noticed defendant's car approaching after it had passed Michigan avenue. Klein was on the sidewalk fifteen to twenty feet west of and in front of the scene of the accident; his attention was drawn to the occurrence when he first saw plaintiff "dart" in front of defendant's car or, as he put it later, when he saw plaintiff "sort of shuffle out" in front of the automobile; whatever plaintiff's pace, Klein "was completely surprised that he had walked out; ***. I didn't see whether he walked out, or it seemed to me like he darted ahead. I had no idea he was going to walk across

in the path of that car." Klein had a clear view of the accident--there were no parked cars to obstruct his vision.

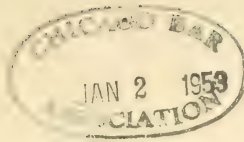
Gerald M. Ryan, another witness called on behalf of defendant, testified that while he and his wife were window-shopping along the southwest corner of Michigan avenue and 113th street, he happened to turn around and saw a car with very bright lights coming toward him from west to east. His attention having been drawn to the traffic on the corner, he next "noticed a gentlemen [plaintiff] getting out of a car parked about 75 feet back of the intersection on the south side of the street and starting across 113th street behind the car he got out of to the north side of the street and the car with the bright lights going east had passed him. *** At that particular time I noticed a car coming west. The car coming west came right across Michigan avenue on 113th street and was doing about between 15 to 20 miles per hour. The next thing I noticed is this car [defendant's] coming along and the gentleman [plaintiff] was hit, and as a result, he swung around. He hit the auto." Ryan and his wife walked over to the scene of the accident, and Mrs. Ryan persuaded plaintiff not to move and stayed with him until the arrival of an ambulance.

There was other testimony touching upon the question of contributory negligence, but the record discloses no evidence showing or tending to show that plaintiff was in the exercise of ordinary care for his own safety just prior to or at the time of the accident. The law is well settled that a person has no right to knowingly expose

himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution for his own safety. While it is true that the question of contributory negligence is one preeminently for the consideration of the jury, where there is no conflict in the evidence and the court can clearly see that the injury was the result of the negligence of the party injured, it should not hesitate to instruct the jury to return a verdict for the defendant. Illinois Central R.R. Co. v. Oswald, 338 Ill. 270; Wilson v. Illinois Central R.R. Co., 210 Ill. 603; and Beidler v. Branshaw, 200 Ill. 425. In the instant case, at the close of plaintiff's evidence and again at the close of all the evidence, defendant's guardian ad litem moved the court to instruct the jury to find the minor defendant not guilty, and after the adverse verdict moved the court for judgment in defendant's favor non obstante veredicto. Because, as we read the record, the evidence shows that plaintiff was guilty of contributory negligence as a matter of law, a motion directing the jury to find for defendant should have been allowed; denial thereof constituted reversible error. Accordingly the judgment of the Circuit Court is reversed and the cause remanded with directions that judgment notwithstanding the verdict be entered in favor of the minor defendant and against plaintiff for costs.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

NIEMEYER, J., AND BURKE, J., Concur.



348 I.A. 549.
1

45782

HARRY BALDI and EMMA BALDI,
Appellees,

v.

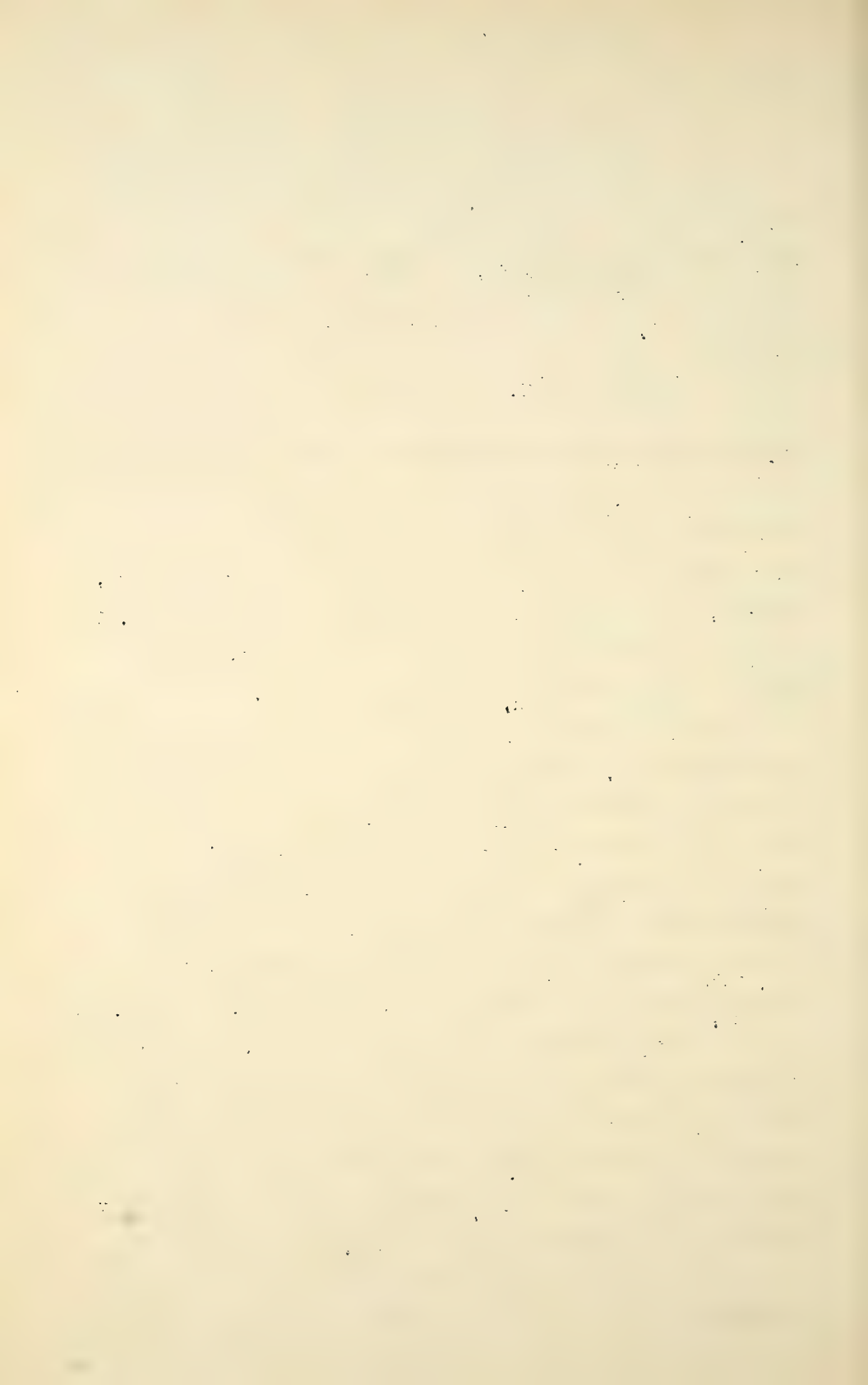
SOL KURTZ,
Appellant.

)
) APPEAL FROM
)
) MUNICIPAL COURT
)
) OF CHICAGO
)

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit in the Municipal Court of Chicago to recover possession of a housing accommodation in the rear of store premises at 3026 West Montrose avenue, Chicago, under the Forcible Detainer statute of Illinois. The court resolved the issues in favor of plaintiffs, entered judgment for possession, and defendant appeals.

From the facts adduced upon the hearing it appears that on March 11, 1948 defendant took possession under a written lease which described the premises as "the Store known as and located at 3026 Montrose Avenue, *** to be occupied for Delicatessen and Food Store and for no other purpose whatever." The term of the lease ran from April 1, 1948 to March 31, 1951. The rental was stipulated at \$3600.00, payable in monthly installments of \$100.00 each. In December 1950 plaintiffs purchased the building, and in January 1951 they notified defendant in writing that the lease would expire on March 31 of that year and would not be renewed or extended, that defendant's tenancy would terminate as of that date, and they demanded that he deliver up possession at the end of the term.



January 18, 1951 there was filed with the housing expediter in Chicago, on behalf of defendant, a "Tenant's Petition for Determination of Status of Store and Dwelling at 3026 West Montrose Avenue, Chicago, Illinois." The petition alleged that "all the premises is a housing and requests the Housing Expediter to make a determination to that effect." Upon expiration of the lease on March 31, 1951 defendant refused to vacate but made no offer or tender of any rental for the premises. June 13, 1951 the area rent director, office of the housing expediter, issued a notice in writing, directed to plaintiffs and defendant, that "the Area Rent Attorney proposes to issue an official interpretation that the business and dwelling portions of the above accommodations are separable; and that only the dwelling portion is subject to the rent regulations for housing. It is further proposed to issue an order herein fixing the maximum legal rent for the dwelling portion of the premises in the amount of \$35.00." The following day plaintiffs filed their action against defendant for recovery of the business portion of the premises. On the same day defendant filed with the office of the housing expediter "Exceptions" to the proposed findings and order. July 2, 1951, pursuant to a trial in the Municipal Court, there was a finding in favor of plaintiffs and against defendant for possession of the store only. (May 21, 1952, the Appellate Court affirmed the finding of the trial court (Baldi v. Kurtz, 347 Ill. App. 174)). On July 9, 1951 the area rent director overruled defendant's exceptions and issued his order in writing finding

that the premises were separable, and that, as to the three rooms in the rear of the store: "the Maximum Rent for the above-described accommodations is hereby fixed at \$35.00 per month, the rent which the Rent Director finds was the rent generally prevailing in this Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date"; and "this order is issued and effective July 9, 1951 in accordance with the Rent Regulation and the Findings of the Rent Director indicated in item 2 [the maximum rent provision] above."

Thereafter, on July 27, 1951, defendant filed an appeal with the office of the housing expediter at Washington, D.C., from the order entered July 9, 1951 by the Chicago defense rental area director. September 12, 1951 Tighe E. Woods, director of rent stabilization, rendered in writing his findings "that the action of the Rent Director is fully substantiated and in accordance with the provisions of the Rent Regulation. Therefore, the appeal should be denied," together with his order that "it is ordered that the above-entitled appeal be, and it hereby is, denied."

On November 24, 1951 plaintiffs served upon defendant a notice and demand in writing, in usual form, commonly known as a landlord statutory five-day notice, demanding payment in the sum of \$280.00 rent for the premises described as the housing accommodation on the ground or first floor of the building commonly known as No. 3026 West Montrose avenue and situated in the rear of store premises

at said address. The notice further notified defendant that payment of said sum was demanded, and that unless payment thereof were made on or before the expiration of the five days, the tenancy would be terminated. Endorsed upon the face of the notice was the following legend: "Maximum Legal Rent \$35.00 per month. Rental Period Covered from April 1st, 1951 to November 30, 1951." On November 29, about 8:00 p.m., plaintiffs received from defendant, by special delivery, a registered letter, together with his personal check for \$280.00. The letter read: "Enclosed you will find^a/check of \$280.00 which you requested claiming it as rental due you. I fully realize that some rental is due you and I make this payment now as payment to you of my occupation of the premises I now possess in your building. Kindly understand it is nonetheless my belief and, thus, my position that the entire premises which I possess is not separable and that it is a housing accommodation and thus under protection of the Federal Law." On the back of the enclosed check there appeared the following endorsement: "This check is payment of \$280.00 in response to demand by payees in said amount for rental. The Drawer desires it to be understood that it is his position that all the premises located at 3026 West Montrose is inseparable and is a housing accommodation. This check is not to be understood to be a waiver by Drawer, Sol Kurtz, of such position."

The day following receipt of the registered letter and check plaintiffs submitted the material to their attorney

who immediately telephoned defendant to inform him that plaintiffs could not accept the check because of the restrictive endorsement appearing on the reverse side thereof and because of the contents of the accompanying letter, and that the check was being returned to defendant immediately by mail.

It is admitted that following these incidents and up to the time of the trial no further or other tender of payment of rental of the sum demanded was made by defendant; also, that defendant had been and was at all times during the term of his written lease, up to and including the date of the trial, December 17, 1951, actively conducting and operating a retail food store or delicatessen business on the premises.

The trial judge found that the proffered check, with its restrictive endorsement and the restrictive conditions and statements contained in defendant's accompanying letter, was not a good or sufficient legal tender of payment; that defendant was guilty of wrongfully withholding the premises; that plaintiffs were entitled to possession thereof; and accordingly the judge assessed plaintiffs' damages in the sum of \$315.00, entered judgment on his findings in favor of plaintiffs, and ordered that issuance of a writ of restitution be stayed to December 31, 1951. Subsequently defendant moved to vacate the judgment order, and in support thereof it was shown that on December 8, 1951 (that being about six days subsequent to the date of the filing of the

case at bar in the Municipal Court) he had filed in the District Court of the United States his petition against plaintiffs, the Chicago area rent director, and Tighe E. Woods, director of rent stabilization, seeking an order restraining defendants (including plaintiffs in the case at bar) from proceeding with and prosecuting the instant forcible detainer action; that the matter having come on to be heard before Judge Barnes of the United States District Court, an order was entered denying the motion for a temporary restraining order and dismissing defendant's complaint for want of jurisdiction.

Defendant takes the position that no agreement had ever been entered into between him and plaintiffs as to the amount of rental due; that although there was a ruling from the office of the housing expediter, it merely fixed the maximum rental at \$35.00 per month, thus setting the highest figure upon which the parties could by contract agree; and that the determination and establishment of such maximum amount could not alone obligate defendant to pay rent in that amount. In support of this contention defendant relies on Hildebrand v. Nee (Municipal Court of Appeals for the District of Columbia), 54 A.2d 640, and Lutz v. Goldberg, 7 N.J. Super. 288, 73 A.2d 65. In the Hildebrand case, a tenant was occupying premises under an existing lease providing for payment of rental at \$80.00 per month. During the term of the lease, on petition of the landlord, the rent administrator fixed a maximum ceiling rental of \$100.00

1. The first part of the report is devoted to a general survey of the situation in the country.

2. The second part contains a detailed analysis of the economic situation and the results of the work.

3. The third part is devoted to the results of the work in the field of culture and education.

4. The fourth part contains a summary of the work and the results of the work.

5. The fifth part is devoted to the results of the work in the field of science and technology.

6. The sixth part contains a summary of the work and the results of the work.

7. The seventh part is devoted to the results of the work in the field of social and political life.

8. The eighth part contains a summary of the work and the results of the work.

9. The ninth part is devoted to the results of the work in the field of international relations.

10. The tenth part contains a summary of the work and the results of the work.

per month. Thereupon the landlord sued the tenant in an attempt to collect the difference between the maximum ceiling rental and the lease rental. The trial court found for the landlord, but on appeal it was held that the rent administrator could not set aside any valid lease where the effect of his order would be to increase, during the term of a lease, the rental fixed therein, and also held that the effect of the maximum rent ceiling fixed by the rent administrator would be to permit the landlord to charge rent at the increased ceiling to some future tenant or to the leasing tenant subsequent to the expiration of his lease. In the Lutz case, a tenant occupied premises under a written lease fixing the monthly rental at \$86.75. During the term of the lease the area rent director ordered a reduction of the maximum rent ceiling to \$77.50. An appeal was had to the housing expediter in Washington, D.C., who reinstated the ceiling figure of \$86.75, making it effective as of the date of the local order reducing the ceiling rental. During the period commencing with the date of the order of the area rent director and until the Washington housing expediter's order reinstating the higher ceiling rental--a four-month period--the tenant paid, and the landlord accepted on account, the lesser amount. The landlord sued for the difference between \$86.75 and \$77.50, or \$9.25, per month, for four months. The tenant there contended that a new agreement was effected between him and the landlord by reason of the landlord's acceptance of the lower rental.

1. *Chrysomelids* 2. *Curculionids* 3. *Chrysomelids* 4. *Chrysomelids* 5. *Chrysomelids* 6. *Chrysomelids* 7. *Chrysomelids* 8. *Chrysomelids* 9. *Chrysomelids* 10. *Chrysomelids* 11. *Chrysomelids* 12. *Chrysomelids* 13. *Chrysomelids* 14. *Chrysomelids* 15. *Chrysomelids* 16. *Chrysomelids* 17. *Chrysomelids* 18. *Chrysomelids* 19. *Chrysomelids* 20. *Chrysomelids* 21. *Chrysomelids* 22. *Chrysomelids* 23. *Chrysomelids* 24. *Chrysomelids* 25. *Chrysomelids* 26. *Chrysomelids* 27. *Chrysomelids* 28. *Chrysomelids* 29. *Chrysomelids* 30. *Chrysomelids* 31. *Chrysomelids* 32. *Chrysomelids* 33. *Chrysomelids* 34. *Chrysomelids* 35. *Chrysomelids* 36. *Chrysomelids* 37. *Chrysomelids* 38. *Chrysomelids* 39. *Chrysomelids* 40. *Chrysomelids* 41. *Chrysomelids* 42. *Chrysomelids* 43. *Chrysomelids* 44. *Chrysomelids* 45. *Chrysomelids* 46. *Chrysomelids* 47. *Chrysomelids* 48. *Chrysomelids* 49. *Chrysomelids* 50. *Chrysomelids* 51. *Chrysomelids* 52. *Chrysomelids* 53. *Chrysomelids* 54. *Chrysomelids* 55. *Chrysomelids* 56. *Chrysomelids* 57. *Chrysomelids* 58. *Chrysomelids* 59. *Chrysomelids* 60. *Chrysomelids* 61. *Chrysomelids* 62. *Chrysomelids* 63. *Chrysomelids* 64. *Chrysomelids* 65. *Chrysomelids* 66. *Chrysomelids* 67. *Chrysomelids* 68. *Chrysomelids* 69. *Chrysomelids* 70. *Chrysomelids* 71. *Chrysomelids* 72. *Chrysomelids* 73. *Chrysomelids* 74. *Chrysomelids* 75. *Chrysomelids* 76. *Chrysomelids* 77. *Chrysomelids* 78. *Chrysomelids* 79. *Chrysomelids* 80. *Chrysomelids* 81. *Chrysomelids* 82. *Chrysomelids* 83. *Chrysomelids* 84. *Chrysomelids* 85. *Chrysomelids* 86. *Chrysomelids* 87. *Chrysomelids* 88. *Chrysomelids* 89. *Chrysomelids* 90. *Chrysomelids* 91. *Chrysomelids* 92. *Chrysomelids* 93. *Chrysomelids* 94. *Chrysomelids* 95. *Chrysomelids* 96. *Chrysomelids* 97. *Chrysomelids* 98. *Chrysomelids* 99. *Chrysomelids* 100. *Chrysomelids*

•

... ..

The trial court entered judgment for the tenant, but the reviewing court, in reversing the order, held that "when the order of the local director was entered, the plaintiff could not accept more than \$77.50, for fear that if the order were affirmed he would be subject to the penalties provided in the Act." Neither of these cases is controlling.

In the case at bar defendant sought the intervention of the housing expediter and obtained relief. Thereafter he not only withheld the entire premises from plaintiffs after the expiration of his lease but refused to accept the conclusions, findings and determination of the housing expediter that the premises were separable; and refused to accede to, or abide by, the other findings and final order of the Federal housing expediter and the findings and judgments of the Municipal Court both in the instant case and in the prior case for recovery of the business unit. In fixing the maximum rental, the housing expediter found that \$35.00 per month was the amount of rent generally prevailing "in this Defense-Rental Area for comparable housing accommodations on the Maximum Rent Date." In making his qualified tender by check in the amount of \$280.00, representing rent at \$35.00 per month for eight months, which was past due, defendant at least impliedly agreed to the maximum amount fixed by the rent expediter as the rent which should be paid for the housing accommodations, and he should not now be heard to contend that the determination and establishment of the exact monthly rental was necessary

before he became obligated to pay for his housing accommodations.

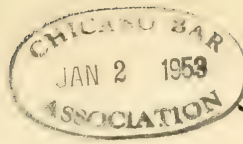
Up to the time of the trial, defendant still occupied the premises, conducted a food store therein and lived in the rooms back of the store. His course of action savors of an attempt to delay plaintiffs in obtaining possession of the premises or securing the legal rental therefor.

The remaining contention of defendant that a proper tender of rental was made by check is untenable. The letter in which the check was enclosed, and the qualified endorsement on the check itself, made it impossible for plaintiffs to accept it without waving their rights. We think the trial court correctly held that the tender was improper and insufficient.

For these reasons the judgment of the Municipal Court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

NIEMEYER, J., and BURKE, J., Concur.



348 I.A. 549.
2

45854

CHARLES SHEMAITIS,
Appellant,

v.

ROBERT P. COLLINS, STEPHEN LOVE
and ALLIED STORAGE WAREHOUSE,
Incorporated,
Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

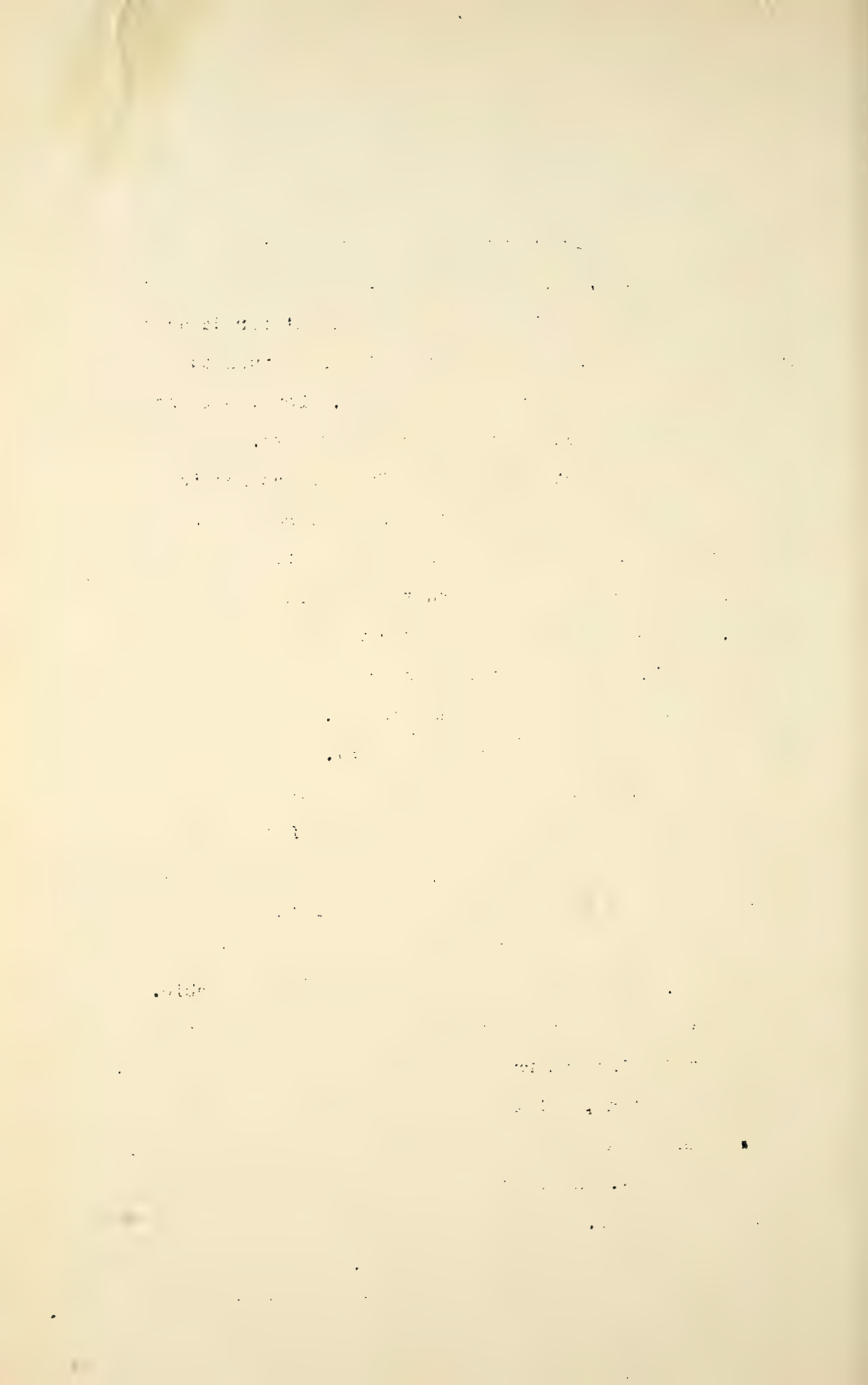
MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for Stephen Love, defendant, entered upon a verdict of not guilty, and a judgment for Robert P. Collins, defendant, entered notwithstanding the verdict finding the defendant guilty and assessing plaintiff's damages at \$1,700.

Plaintiff and his wife were having trouble. The wife employed the defendant Love, an attorney, to represent her. On July 3, 1947 when plaintiff was at work, the wife, accompanied by defendant Collins, a brother-in-law of Love, and employees of Allied Storage Warehouse, Inc., went to the home of plaintiff and started to remove the furniture. While this work was in progress plaintiff came to his home and protested the removal of the furniture. He testified that Collins, representing himself to be a plain clothes policeman, told him not to object; that on his insistence that the furniture should not be moved, Collins said that plaintiff was under arrest and would be held so long as he objected to the removal of the furniture. The furniture was removed. In subsequent litigation in the Municipal court plaintiff was found to be the owner of part of the furniture and his wife to be the owner of the remainder.

Plaintiff's furniture was returned to him upon the payment by him of \$121.64, warehouse charges. He also paid delivery charges. Thereafter this action was brought for damages based on the unlawful removal of plaintiff's furniture and his unlawful or false arrest by Collins. Love, Collins and the warehouse company were made defendants.

The complaint charges that Collins was Love's servant or agent in the transaction. This relationship was denied by answer and there is no testimony to support the charge. The jury found Love and the warehouse company not guilty. No objection is made to the verdict and judgment entered thereon as to the warehouse company. The verdict and judgment in favor of Love are proper. Love represented Collins in the trial court and on appeal. Objection is made to the informality of plaintiff's brief and its failure to strictly comply with the rules of this court. The brief shows plainly that the appeal as to the defendant Collins is based upon the alleged error of the trial court in entering judgment for Collins notwithstanding the verdict against him. The objection to the brief is not tenable. Collins did not file a motion for new trial. The record shows that Collins contradicted the testimony of plaintiff, testifying that he, Collins, did not represent himself to be a policeman and did not tell plaintiff that he, plaintiff, was under arrest. An issue of fact was presented as to the conduct of Collins. On appeal objection is made that the verdict of \$1,700 is grossly excessive. It is conceded, as it must be, that plaintiff suffered a money loss of at

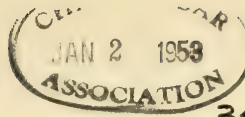


least \$121.64, the amount paid for the storage of his furniture wrongfully removed from his home. Exemplary damages were allowable in the case and could have been allowed by the jury notwithstanding the failure to give a specific instruction as to such damage. However, the excessiveness of the verdict cannot be raised on a motion for judgment notwithstanding the verdict. The evidence of plaintiff, taken as true, with all reasonable inferences favorable to plaintiff to be drawn therefrom, warrants a finding of guilty as to the defendant Collins. Citation of authority is unnecessary to support the conclusion that on this record the entry of judgment for Collins notwithstanding the verdict was erroneous.

The judgment appealed from is affirmed as to Love and reversed as to Collins and the judgment previously entered in favor of plaintiff and against Collins upon the verdict of the jury is reinstated.

JUDGMENT AFFIRMED AS TO LOVE
AND REVERSED AS TO COLLINS;
JUDGMENT PREVIOUSLY ENTERED
AGAINST HIM UPON VERDICT
REINSTATED.

FRIEND, P. J., AND BURKE, J., Concur.



348 I.A. 550

45904

CLARENCE J. MIMMACK,

Appellee,

v.

MARGUERITE McNULTY, Individually
and as Executrix of the Estate of
Charles C. Mimmack, Deceased,
Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant, executrix and sole beneficiary under a will of Charles C. Mimmack, deceased, admitted to probate in Cook county, appeals from a decree of the Superior court of Cook county for specific performance directing that she turn over and deliver to plaintiff the entire estate of decedent after payment of lawful claims and costs of administration.

The complaint alleges that the plaintiff and decedent were brothers; that decedent died December 7, 1950; that on January 24, 1951 a last will and testament, executed June 10, 1947, was admitted to probate in Cook county; that under this will decedent's entire estate was left to defendant Marguerite McNulty, a stranger to decedent; that on or about August 20, 1947 plaintiff and decedent entered into an oral agreement whereby plaintiff agreed to make a will leaving his entire estate to decedent if decedent simultaneously made a will leaving his entire estate to the plaintiff; that on or about August 27, 1947, pursuant to the agreement, plaintiff and decedent duly executed a joint and reciprocal will, properly attested, under

the terms of which upon the death of either plaintiff or decedent the survivor was to act as executor without surety, just debts and costs of administration were to be paid and the entire net estate of the party dying first was to vest in the survivor, and further providing that neither of the parties should revoke said will or make any other will or testament without the written consent of the other; that plaintiff did not revoke or attempt to revoke the joint and reciprocal will, nor was any written consent ever given to do so; that the will executed as aforesaid was left in the custody and possession of decedent and that since his death the will has not been found although diligent search and inquiry were made. The prayer of the complaint is for a finding that a valid and subsisting contract existed between plaintiff and decedent whereby the survivor was to inherit the entire estate of the other, and that a decree be entered directing defendant to fulfill the contract by turning over to plaintiff all the assets in her hands as executrix after costs of administration, claims and charges, and that the contract have priority over the legatee named under the will of June 10, 1947.

Defendant moved for a summary judgment dismissing the cause on the ground that plaintiff had filed a claim against the estate of decedent in the Probate court of Cook county upon the identical facts alleged in the complaint herein; that said claim was stricken by order of the Probate court; that an appeal from that order was perfected and was then

the first of these is the fact that the

second is the fact that the

third is the fact that the

fourth is the fact that the

fifth is the fact that the

sixth is the fact that the

seventh is the fact that the

eighth is the fact that the

ninth is the fact that the

tenth is the fact that the

eleventh is the fact that the

twelfth is the fact that the

thirteenth is the fact that the

fourteenth is the fact that the

fifteenth is the fact that the

sixteenth is the fact that the

seventeenth is the fact that the

eighteenth is the fact that the

nineteenth is the fact that the

twentieth is the fact that the

twenty-first is the fact that the

twenty-second is the fact that the

twenty-third is the fact that the

twenty-fourth is the fact that the

twenty-fifth is the fact that the

twenty-sixth is the fact that the

pending in the Superior court of Cook county. Plaintiff answered the motion for summary judgment, admitting that the proceedings in the Probate court and in the present case were similar, but insisting that they were not inconsistent. Defendant's motion for summary judgment dismissing the complaint was denied and an order entered enjoining plaintiff from prosecuting the appeal from the probate court until this action is disposed of. Thereafter defendant moved to dismiss the complaint upon substantially the ground stated in her motion for summary judgment. This motion was denied. Answer was filed to the complaint and a hearing had before the court.

On this hearing Walter W. Keating, an attorney at law, testified that in August of 1947 he was advised by decedent that he and plaintiff had agreed as to their estates; that he was going to give plaintiff his entire estate and plaintiff was to give him his entire estate; that each was to be appointed executor and that they had taken care of their two brothers; that the will would not be voidable without written consent or written notice given by one to the other; that at the request of decedent he prepared a joint and reciprocal will embodying the terms above stated and that the will was delivered to decedent. There was further testimony of Thomas Angst, who had known decedent and plaintiff for 30 years; that in August 1947, on the day plaintiff was leaving for California, decedent in the presence of plaintiff and another person asked the witness to sign a will of himself

and plaintiff, saying that one was leaving the property to the other; that plaintiff, decedent and the other person signed the paper headed "Will," consisting of two pages, and that he, Angst, then signed it; that deceased then walked away with the will. Another witness testified that in August 1947 decedent told him that he had made a will that day because plaintiff was going to California; that if plaintiff died first decedent would be the beneficiary and if decedent died first plaintiff would be the beneficiary. From a decree granting the prayer of the complaint defendant has appealed.

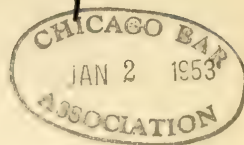
Her first contention is that the order of the Probate court striking plaintiff's claim is res judicata. The hearing on that appeal, being a trial de novo, the appeal sets aside the order of the Probate court. Schwartzfager v. Schwartzfager, 330 Ill. App. 111. The proceedings in the Probate court and the present suit for specific performance are concurrent, not inconsistent remedies. Fleming v. Dillon, 370 Ill. 325. Furthermore, prosecution of the appeal by plaintiff has been enjoined, with the acquiescence, if not active consent, of defendant. It appearing from the evidence before the court that the agreement between plaintiff and decedent had been fully performed, plaintiff having executed the joint and reciprocal will leaving his entire estate to decedent should decedent survive him, there is a valid legal consideration for the agreement relied upon (Evans v. Moore, 247 Ill. 60), and the same is not within the statute of

frauds. Anson v. Haywood, 397 Ill. 370. The evidence in support of the complaint is uncontradicted. It shows a completed transaction in the execution of the joint and reciprocal will and sufficiently details the contents of that will. The testimony is clear, specific and direct. The witnesses testified in open court. The trial court has accepted the testimony of the witnesses as trustworthy. It meets the strict requirements of the law for clear and convincing proof.

The decree is affirmed.

AFFIRMED.

FRIEND, P. J., AND BURKE, J., Concur.



45783

| | | |
|----------------------------------|---|---------------------|
| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| ex rel. EDWARD J. ALBRIGHT, |) | APPEAL FROM CIRCUIT |
| Appellee, |) | |
| |) | COURT, COOK COUNTY, |
| v. |) | |
| |) | |
| CITY OF CHICAGO, a municipal |) | |
| corporation, |) | |
| Appellant. |) | |

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Relator sought a writ of mandamus to compel defendant to issue a retail food dispenser's license for a restaurant operated by him at 1100 West Monroe street, Chicago. When the case came on for trial, the attorney for the city said that a license was refused because relator was conducting and operating a "boogie" in the back of the restaurant, and that he desired to present two reports made by the Captain of Police commanding that district, detailing the evidence which had been found with respect to gambling. The reports were admitted without objection. The attorney representing the city said he did not know whether there was any specific provision of the law which warranted a refusal of the license. The court stated that in view of the admission of counsel for defendant, he would direct that a writ of mandamus issue forthwith. This was all that seems to have occurred at the trial. No evidence was presented by the relator and no other evidence presented by defendant.

Relator has not submitted any briefs. We are, therefore, compelled to rely entirely on defendant's

brief to decide what can be an important precedent; that is, whether the operator of a restaurant, a portion of whose premises is used for gambling purposes, may be denied a retail food dispenser's license. It is common knowledge that many restaurants, cigar stores, and other places of business follow the practice of operating some small gaming device. Whether this warrants a denial or revocation of a license can be an important matter.

The city has cited three cases which seem to support its position. Harrison v. The People, 222 Ill. 150, involving a dramshop, can be distinguished on the ground that such places of business have been subject to far greater regulations than other types. People ex rel. Anderson v. City of Chicago, 312 Ill. App. 187, involved a massage parlor which appears to have been in part devoted to prostitution; and People v. Dever, 236 Ill. App. 135, involved a free dispensary which undertook to teach contraception.

There is a principle of ripeness applied by courts before the constitutionality of a statute is determined. While such great caution is not expected in determining the powers of a city, it is certainly not wise to decide the question on an ex parte presentation of a case. There was no adequate showing for the issuance of the writ.

We therefore reverse the judgment and remand the cause, with directions to the trial court to see to it that the relator presents his case fully and adequately,

-3-

or if he indicates no further interest than he did in this court, to dismiss the suit.

Judgment reversed and cause
remanded with directions.

Robson, P. J., and Tucky, J., concur.



45825

EUSEBIUS JAMES BIGGS,
Appellant,

v.

THE CITY OF CHICAGO,
MARTIN H. KENNELLY,
VIRGIL GUNLOCK and
JOHN J. MORTIMER,
Appellees.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE
COURT.

Plaintiff filed his complaint consisting of two counts attacking the validity of the Illinois Plumbing License Law of 1935 and seeking to restrain defendants from enforcing certain provisions of the Municipal Code of Chicago passed pursuant to authorization of section IX of the 1935 Act. A motion to strike the complaint was sustained and plaintiff appealed directly to the Supreme Court. The Supreme Court held that no constitutional question was involved but merely a question of whether or not the trial court correctly decided that the complaint failed to state a cause of action, and transferred the cause here. Biggs v. City of Chicago, 411 Ill. 566.

Count one of the complaint alleges that the plaintiff has been engaged in the plumbing business in Illinois and Indiana for more than twenty years; that he is unable to do plumbing work in Chicago because he does not have a license as a master plumber and without such license under the provisions of chapters 82 and 83 of the plumbing code of the City of Chicago cannot obtain necessary permits. It is alleged that these provisions of the ordinance are

THEORY OF THE

UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

THE UNIVERSITY OF

in violation of the Constitution of the State of Illinois and asks that the officials of the City of Chicago be restrained by injunction from enforcing chapters 82, 83 and 162 of the plumbing code.

Later an amended complaint was filed adopting the allegations of the original complaint, and alleging further that the examination of plaintiff to be a master plumber would be conducted under the rules permitted in section 20-11 of the Chicago plumbing code and maintains that said rules are detrimental to the health and safety of the citizens of Chicago and are arbitrary and unreasonable; that applicants are required to fill out a form of application before an examination is taken, and challenges the constitutionality of the provision of this section. He further alleges that licensing a master plumber is not a necessary health and safety measure and is maintained for the purpose of perpetuating a monopoly.

Later a pleading designated a supplemental complaint was filed wherein it was alleged that since the filing of the cause a new law known as the Illinois Plumbing License Law had been adopted in the State of Illinois and was in force at the time of filing of the pleading; that this Act repeals all sections of the former Illinois Plumbing License Law including the provision as to licensing of master plumbers, journeymen plumbers and the qualifications necessary for licenses, so that as of the date of the filing of the pleading there were no legally licensed

master plumbers in Chicago and it is therefore impossible to comply with the paragraphs of the Municipal Code of Chicago pertaining to such licensing; that at the present time the City of Chicago has been issuing permits to install water piping under the void sections of the law and refuses to issue permits to plaintiff and is causing him irreparable harm; that under pertinent sections of the new Act the City of Chicago is empowered to write an ordinance and provide for a board of plumbing examiners to conduct examinations for master plumbers; that under certain sections of the Act, "which plaintiff may be qualified to meet," a temporary permit should be issued which would permit plaintiff to obtain a plumber's license without examination within the discretion of the Director as to work outside the City of Chicago. He maintains that certain sections of the new Act are unconstitutional. He further alleges that it is mandatory for the City of Chicago to write an enabling ordinance.

The motion to strike these various pleadings sets up the following facts: that the former Plumbing License Law of 1935 was invalidated by the Supreme Court in People v. Brown, 407 Ill. 565, and was entirely repealed by the General Assembly when it enacted the Illinois Plumbing Licensing Law of 1951; that as a result of this invalidation the then existing Chicago plumbing licensing ordinance (chapter 162 of the Municipal Code) fell with it; that therefore all questions raised by the plaintiff in count one have become moot. With reference to count two in

The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The second fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The third fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The fourth fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The fifth fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The sixth fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The seventh fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The eighth fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The ninth fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States. The tenth fact is that the majority of the population of the United States is of European descent. This is a fact which is often overlooked, and which is of great importance in understanding the history and development of the United States.

the amended and supplemental complaints, in which plaintiff seeks to attack the Illinois Plumbing License Law, defendants allege that the Act provides a procedure for the issuance of the license to engage in plumbing by the State of Illinois; that its provisions are expressly made applicable to the entire State, section 8 (1) providing:

"Any city, village or incorporated town having a population of 500,000 or more, may, by an ordinance containing provisions substantially the same as those in this Act, provide for a board of plumbing examiners to conduct examinations for Journeyman Plumbers and Master Plumbers, and to issue, suspend and revoke plumbers' licenses within such city, village or incorporated town. The provisions of this Act except as otherwise herein provided, shall not apply within any such city, village or incorporated town which enacts such an ordinance."

The motion alleges that the grant of licensing power is permissive only; that the City of Chicago has passed no ordinance thereunder, and until such time as the City of Chicago elects to adopt an ordinance regulating the licensing of plumbers within the city, all such licenses within the City of Chicago as well as the rest of the State must be obtained from the State of Illinois; that plaintiff's pleadings set forth no facts which would indicate that any application had been made to the State of Illinois for such license.

It therefore appears that the plaintiff is asking for a plumbing license from the city which the city has no authority to issue because there is no existing city plumbing licensing law. He is further asking for a permit to do plumbing work but sets forth no facts to indicate that he has either a city license under the pre-existing ordinance

1. The first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

the first of these is the fact that the

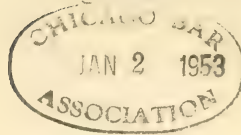
the first of these is the fact that the

the first of these is the fact that the

or a state license under the Act of 1935, nor that he has applied for a state license under the Act of 1951. He is asking the court to restrain the enforcement of an ordinance which is no longer in effect by virtue of the unconstitutionality of the Act under which it was passed, and to restrain the enforcement of a new plumbing licensing ordinance which is not yet in existence. We think the action of the trial court in dismissing the complaint as stating no cause of action was proper. The judgment of the Circuit Court of Cook County is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.



45837

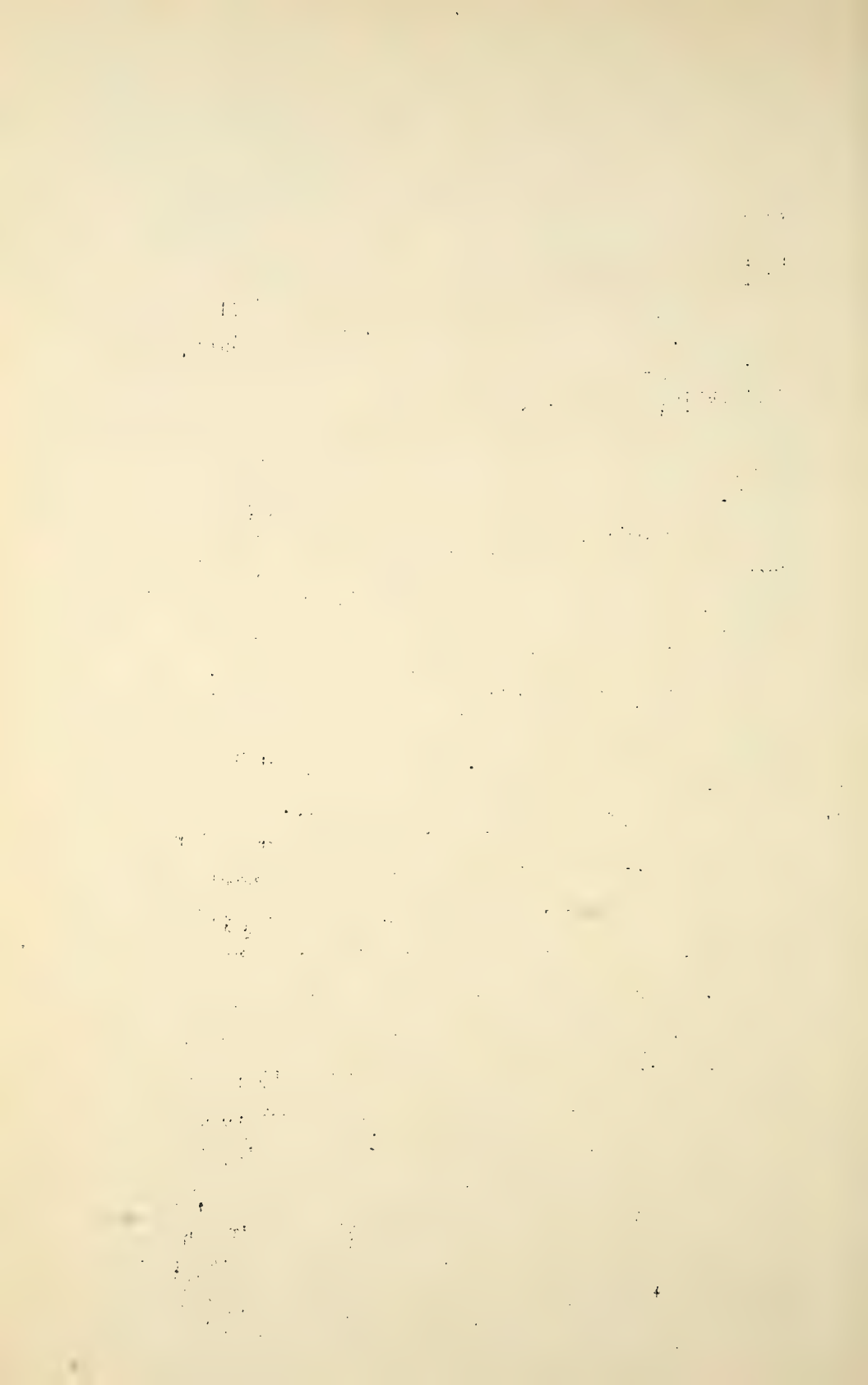
| | | |
|------------------------|---|---------------------|
| PEOPLE OF THE STATE OF |) | |
| ILLINOIS, |) | |
| Defendant in Error, |) | ERROR TO CRIMINAL |
| |) | |
| v. |) | COURT, COOK COUNTY. |
| |) | |
| JOHN A. GAVURNIK, |) | |
| Plaintiff in Error. |) | |

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Defendant, John A. Gavurnik, was convicted by a jury in the Criminal Court of Cook County of leaving the scene of an accident and sentenced to imprisonment in the county jail of Cook County for a term of one year.

Defendant contends that the corpus delicti, of the crime of leaving the scene of an accident, was not proved because the only evidence connecting him with the crime was a confession made prior to trial.

While it is true that an extrajudicial confession is insufficient to establish a crime in the absence of other proof of the corpus delicti (People v. Davis, 358 Ill. 617), we think there was such other proof here present. There was evidence tending to prove that on November 2, 1949 James Nadolny, a boy 17 years of age, and George Mitchell, a friend of Nadolny, while walking down a highway in the City of Chicago, were struck by a sedan delivery panel truck traveling east on Gunnison street, and after the accident the truck did not stop, but increased its speed and kept on going, leaving both boys lying in the middle of the street; that the Mitchell boy was killed and the Nadolny boy seriously injured;



that police arriving at the scene of the accident shortly afterward found a rear view mirror lying in the street near the scene of the accident; that later this mirror was traced and found to fit perfectly to the screw holes and paint chips on a panel sedan Chevrolet truck, the rear view mirror of which was "brand new" and which truck had been driven by defendant on the day of the accident. It was further proved that on November 11th defendant was taken into custody about 9:00 p.m. and driven to the county highway police station where he wrote a statement in longhand admitting he was driving the truck on the day of the accident when it started to snow; that the windshield wiper on his truck was missing and he could not see; that he struck the boys but that he was so frightened he did not know what to do next and went home; that the truck corresponded to the description given by a witness and was driven to the police station with defendant's permission.

The above facts having been proved by competent evidence, we think the corpus delicti is established. That being so, it was proper to prove the identity of the person causing the accident by any competent evidence including his confession. In Layfield v. State, 173 So. 654, the court said:

"* * * the corpus delicti consists in a motor vehicle operated by some person, who, knowing or having reason to believe that injury has been caused to a person or property by said motor vehicle, and that such person so operating such motor vehicle leaves the place of injury or accident without stopping, etc.

When the above facts have been proven by competent evidence the corpus delicti is made out, and the question of the identity of the person is separate and distinct, and may be shown by any competent evidence, including a confession of the party charged with the offense."

Defendant further contends that the confession, which he admits having made, was induced as a result of fear and that the confession should be excluded unless all the police officers engaged in or present at the hearing where the confession was made are called as witnesses. People v. Sloss, 412 Ill. 61.

In the instant case the evidence shows that two police officers, Gleason and Tlamsa, were present during the whole or part of the confession and that no other officers took part in the hearing. Both of these officers denied that any brutality or duress was used but insisted that the confession was entirely voluntary. The decision of the trial court on the question of whether a confession is voluntary will not be disturbed unless it is manifestly against the weight of the evidence. People v. Albers, 360 Ill. 73. We are unable to say that the decision of the trial court in this respect was against the manifest weight of the evidence.

Defendant contends, finally, that he was not identified as the driver of the truck involved in the accident. Witness Ann Davidson testified that she saw defendant drive away in a sedan panel truck shortly before the accident on the day in question; that she later saw the truck at the police station at Morton Grove; that

the truck she saw at the police station was the same truck in which defendant drove away. There was further evidence that the truck at the police station was the same truck which was traced through the mirror. Moreover the confession, properly admitted in evidence, was an admission that defendant was driving the truck which struck the boys.

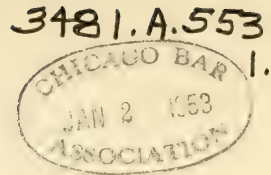
The judgment of the Criminal Court of Cook County finding the defendant guilty of leaving the scene of an accident is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

• *Journal of the American Medical Association*, 1997; 277: 1033-1037



45830

ANNA KLUKAS,

Appellee,

v.

UNION LIFE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in the sum of five hundred dollars in an action on an insurance policy issued by defendant. The trial court directed the jury to find the issues in favor of plaintiff and entered judgment accordingly.

The report of proceedings in the trial court having been stricken in this court the cause is before us on the common law record.

The statement of claim alleges in substance the issuance of a life insurance policy for five hundred dollars to one John Klukas; that shortly after the death of the insured, representatives of the defendant induced plaintiff to surrender possession of the insurance policy; that the policy is now in the possession of defendant; and that there is due plaintiff the sum of five hundred dollars and lawful interest thereon from the date of the death of the insured on November 19, 1949.

Defendant filed a defense averring that the insured denied in his application for the policy here in controversy that he had ever taken alcoholic stimulants or

narcotics to excess; that the insured was a chronic alcoholic and that had the defendant known of the excessive use of intoxicating liquors by the insured it would not have issued the policy. No reply was filed by plaintiff to the defense.

As grounds for reversal defendant urges (1) that when new matter by way of defense is pleaded in an answer and no reply is filed the new matter set forth in the answer shall be deemed admitted; and (2) that a party calling a witness who has demonstrated his hostility has the right to refresh the memory of the witness.

The rule seems well established in this State that where, in the absence of a reply, defendant introduces evidence to prove an affirmative defense, the failure to file a reply is waived and the absence of a reply does not constitute an admission. Cienki v. Rusnak, 398 Ill. 77. In the recent case of Dyslin v. Wolf, 347 Ill. App. 80, the court held that a reply will be considered to be waived where there is no report of trial proceedings presented to the reviewing court, as an examination of the report of the proceedings might disclose a waiver of the reply. Moreover since there is no report of the trial proceedings in this case the presumption is that the evidence was sufficient to justify the trial court in directing the jury to return a verdict in favor of plaintiff and entering judgment thereon.

As to defendant's other contention, we can only infer from the argument advanced in its brief that defendant did introduce some evidence. But we cannot rule on the

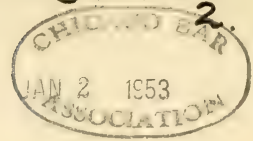
Journal of Management Studies, 19(1), 67-80.

question whether the trial court erred in sustaining plaintiff's objections to certain questions propounded by defendant to its witness, because of the absence of the report of proceedings in the trial court.

In this state of the record we are impelled, for the reasons given, to affirm the judgment.

JUDGMENT AFFIRMED.

FEINBERG AND KILEY, JJ., CONCUR.



45833

MORRIS NELSON, a minor, by
MAMIE NELSON, his next friend,

Appellee,

v.

BERTRAM A. STONE, Administrator
of the Estate of Sam Burlow,
Deceased,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with verdict and judgment for plaintiff in the amount of \$7,500. Defendant has appealed.

The accident happened May 7, 1946 about 5:30 p.m., near the intersection of 16th Street and Sawyer Avenue in Chicago. Morris Nelson, 14 years old and mentally retarded at the time, was walking from south to north on 16th Street in the crosswalk on the east side of Sawyer Avenue. When he was within a few feet of the north curb he was struck on the right side by an automobile driven west on 16th Street by Sam Burlow who died before trial. Plaintiff's minor was thrown to the ground and his left foot and ankle were injured.

The questions raised on this appeal are: (a) whether the verdict and judgment should be set aside because the implicit finding that the automobile accident was the proximate cause of the injury is against the manifest weight of evidence, and (b) whether there was error in instructing the jury.

There is testimony that no horn was blown, the automobile was going "very fast", brakes screeched, the boy's body "went a couple of feet", his shoe was "broken"; that immediately after the accident his foot was "very swollen," the leg was "red right up to the thigh" and the boy was "very white" and that he was carried to the wash room for three days; that he was seen limping for the first time "about three days" after the accident; and that he did not limp before the accident but has limped ever since.

Plaintiff's medical witness testified he first saw the boy April 10, 1948; that he walked with a slight limp and that the right knee was slightly bent; that measurements disclosed the left leg was $3/4$ of an inch shorter than the right; that in May, 1950 the spine showed deviation, and the shortening of the left leg increased to one inch, and a difference of $1/2$ inch in the circumference of the left leg below the knee, and a 20 degree limitation in the rotation of the left hip; that in November, 1951, a month before trial, the findings were the same as those in May, 1950; that growth in long bones stops at about 17 years; and that surgery to shorten the right leg was probably the correct treatment.

Plaintiff's doctor answered a hypothetical question by stating there "might or could be" a causal connection between the accident and injury. The question when first propounded included the assumption that in December, 1946 the boy fell down school stairs. This was stricken from

The first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the
the fifth is the fact that the
the sixth is the fact that the
the seventh is the fact that the
the eighth is the fact that the
the ninth is the fact that the
the tenth is the fact that the
the eleventh is the fact that the
the twelfth is the fact that the
the thirteenth is the fact that the
the fourteenth is the fact that the
the fifteenth is the fact that the
the sixteenth is the fact that the
the seventeenth is the fact that the
the eighteenth is the fact that the
the nineteenth is the fact that the
the twentieth is the fact that the
the twenty-first is the fact that the
the twenty-second is the fact that the
the twenty-third is the fact that the
the twenty-fourth is the fact that the
the twenty-fifth is the fact that the
the twenty-sixth is the fact that the
the twenty-seventh is the fact that the
the twenty-eighth is the fact that the
the twenty-ninth is the fact that the
the thirtieth is the fact that the
the thirty-first is the fact that the
the thirty-second is the fact that the
the thirty-third is the fact that the
the thirty-fourth is the fact that the
the thirty-fifth is the fact that the
the thirty-sixth is the fact that the
the thirty-seventh is the fact that the
the thirty-eighth is the fact that the
the thirty-ninth is the fact that the
the fortieth is the fact that the
the forty-first is the fact that the
the forty-second is the fact that the
the forty-third is the fact that the
the forty-fourth is the fact that the
the forty-fifth is the fact that the
the forty-sixth is the fact that the
the forty-seventh is the fact that the
the forty-eighth is the fact that the
the forty-ninth is the fact that the
the fiftieth is the fact that the
the fifty-first is the fact that the
the fifty-second is the fact that the
the fifty-third is the fact that the
the fifty-fourth is the fact that the
the fifty-fifth is the fact that the
the fifty-sixth is the fact that the
the fifty-seventh is the fact that the
the fifty-eighth is the fact that the
the fifty-ninth is the fact that the
the sixtieth is the fact that the
the sixty-first is the fact that the
the sixty-second is the fact that the
the sixty-third is the fact that the
the sixty-fourth is the fact that the
the sixty-fifth is the fact that the
the sixty-sixth is the fact that the
the sixty-seventh is the fact that the
the sixty-eighth is the fact that the
the sixty-ninth is the fact that the
the seventieth is the fact that the
the seventy-first is the fact that the
the seventy-second is the fact that the
the seventy-third is the fact that the
the seventy-fourth is the fact that the
the seventy-fifth is the fact that the
the seventy-sixth is the fact that the
the seventy-seventh is the fact that the
the seventy-eighth is the fact that the
the seventy-ninth is the fact that the
the eightieth is the fact that the
the eighty-first is the fact that the
the eighty-second is the fact that the
the eighty-third is the fact that the
the eighty-fourth is the fact that the
the eighty-fifth is the fact that the
the eighty-sixth is the fact that the
the eighty-seventh is the fact that the
the eighty-eighth is the fact that the
the eighty-ninth is the fact that the
the ninetieth is the fact that the
the ninety-first is the fact that the
the ninety-second is the fact that the
the ninety-third is the fact that the
the ninety-fourth is the fact that the
the ninety-fifth is the fact that the
the ninety-sixth is the fact that the
the ninety-seventh is the fact that the
the ninety-eighth is the fact that the
the ninety-ninth is the fact that the
the hundredth is the fact that the

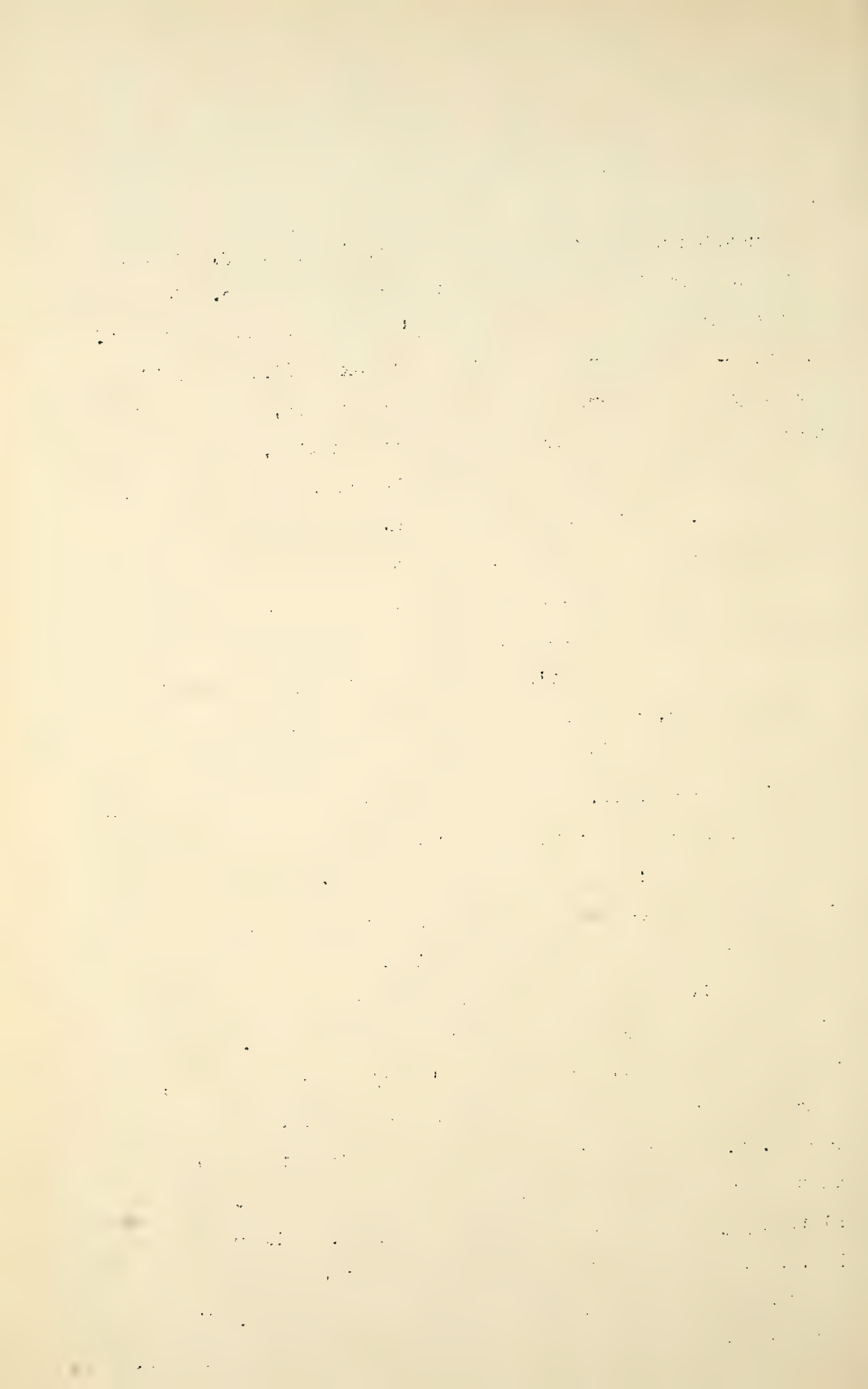
the question upon objection of defendant's attorney, and was not considered by the doctor in the opinion he gave. He gave a further opinion that the boy's condition was permanent. On cross-examination he said it might make a difference if the hypothetical person had fallen down stairs, or had medical treatment before the doctor's first examination, depending what the facts were in each event. No facts were suggested.

After the doctor testified, the boy's mother testified he fell down stairs at school in December, 1946 and hurt the same foot, he went to the hospital, and wore a rubber bandage for a week until the swelling subsided.

The defendant's medical expert examined the boy August 8, 1946, and testified that the boy complained of pains and cramps in the left leg but examination showed no swelling, tenderness, shortening or impairment of the function of the ankle and foot; that a bruise might not be followed by discoloration; that the boy did not limp; and that no complaint was made of shortening. No hypothetical question was put to this witness upon causality.

Defendant contends that the hypothetical question did not include the fact of the fall on the stairs. This, was not included because defendant's objection removed it, since there was at the time no evidence of the fact in the record. The trial court could have permitted its inclusion on the promise to produce supporting evidence later.

Pittsburgh, Fort Wayne and Chicago R. R. Co. v. Moore, 110 Ill. App. 304. Defendant did not restate the question with the fact included after the evidence was introduced. We think that under the circumstances defendant cannot complain.



Plaintiff relied on the testimony of her expert and other witnesses to prove the element of proximate cause. She did not produce testimony from the hospital. She was not obligated to do so. We think there was prima facie proof of the element. There is no countervailing proof in the record with respect to a causal connection between the injury and the fall on the stairs. It follows that the finding for the plaintiff on this phase of the case cannot be against the manifest weight of the evidence.

We find no reversible error in the instructions to the jury. The refused instruction No. 4 being directory was, more forcible than the given instruction on the same subject, but we do not think whatever prejudice followed was serious enough to warrant a retrial. The refusal of defendant's instructions Nos. 2 and 3 was proper. No. 2 is too involved, could be misleading, and singled out the medical witnesses in pointing out the weight to be given to testimony. No. 3 states that if the jury believes the hospital evidence was available to plaintiff and that she failed to produce it, the presumption is that the testimony would be unfavorable to plaintiff. The instruction is bad since there was no showing that the evidence was not equally accessible to both parties. Maradeo v. Chicago Transit Authority, 339 Ill. App. 646.

For the reasons given above we think the lower court was correct and should be affirmed.

AFFIRMED.

LEWE, P.J. AND FEINBERG, J., CONCUR.



348 I.A.594

General No. 10608

Agenda No. 2

In The
APPELLATE COURT OF ILLINOIS
Second District

October Term, A. D. 1952.

William I. Pollack and
Hymen H. Pollack

Plaintiffs-Appellants

vs

Emma B. Theiss and
Otto J. Theiss

Defendants-Appellees

Appeal from the
Circuit Court of
Kane County.

Dove, P. J.

On May 4, 1951, the plaintiffs, filed their verified complaint in the Circuit Court of Kane County seeking to recover an earnest money payment of \$3000.00 which amount the plaintiffs alleged they had paid to one of the defendants, Emma B. Theiss, to apply on the purchase price of certain real estate in Aurora. This complaint and an amended complaint thereafter filed by leave of court were dismissed on motion of the defendants.

Thereafter and on July 24, 1951 a verified second amended complaint was filed by leave of court. On November 23, 1951 the following order dismissing this second amended complaint was entered:

"This day this cause coming on to be heard on the motion of the defendants to strike the second amended complaint filed herein by the plaintiffs, and the court having considered said second

amended complaint and the said motion to strike and the court having heard the argument of counsel and being fully advised in the premises,

It is ordered that the said motion to strike the second amended complaint be and the same is hereby granted and that said second amended complaint be and it is hereby stricken."

An examination of the record discloses that no further steps were taken in this case until January 28, 1952 when the plaintiffs filed their notice of appeal which recited that they appealed "from the final order entered in this cause on November 23, 1951 granting the motion of defendants herein to strike the second amended complaint to the Appellate Court of Illinois for the Second District."

In Board of Education of Grant Community High School District No. 121 Lake County, vs. Board of Education, 301 Ill. App. 228, this Court said, (p. 229) "An Order merely sustaining a demurrer to the complaint, and upon which no judgment is entered, is not a final adjudication. Freeman on Judgments (5th ed.) vol. 2, p. 1512, par. 717. This rule is observed in the case of Trebbin v. Thoeresz, 316 Ill. 30, 32; Barber v. Wood, 318 Ill. 415. In each of the above cases it is stated that under such circumstances, the court will of its own motion dismiss the appeal. It is further stated by Freeman in the paragraph above referred to, that a judgment for costs only, without a determination of the cause, is not a final judgment. This principle is announced in Williams v. Huey, 263 Ill. 275. Where a motion to dismiss a complaint, which is in the nature of a demurrer, is sustained, for such ruling to become final, a judgment should be entered for the defendant to the effect that the plaintiff take nothing by virtue of such action and that the defendant go hence without



day, or words of similar import and meaning. Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200. This same principle is announced in the cases of County of Franklin v. Blake, 257 Ill. 354; Williams v. Huey, supra, and Prange v. City of Marion, 297 Ill. App. 353."

The order entered by the Circuit Court is not a final order and where an appeal is taken from such an order this Court is without jurisdiction to review it notwithstanding the fact that appellees have not raised the question but have filed their briefs. (Prange v. City of Marion, 297 Ill. App. 353 and cases therein cited.)

Appellants filed herein their motion to strike from the record on appeal the original complaint, the amended complaint and the several motions and orders in connection therewith called for by the praecipe for additional record filed by appellees and to tax against appellees the fees and charges of the Circuit Clerk of Kane County for including these items in the transcript of the record. This motion was taken with the case. These portions of the record are unnecessary and immaterial within the contemplation of Paragraph 3 of Rule 36 of the Supreme Court (Ill. Rev. St. 1951 Chap. 110, par. 259, 36.) The cost of preparing the unnecessary portions of the record is \$25.00 as shown by the receipt of the Circuit Clerk. The motion of appellants' is sustained in part and costs in the amount of \$25.00 will be taxed by the Clerk against appellees.

This appeal must be dismissed for want of a final order.

Appeal dismissed.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of April, in the year of our Lord one thousand nine hundred and sixty-nine.

John E. Hall
Clerk of the Appellate Court.



3481.A.595

General No. 10617

Agenda No. 5

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A.D. 1952

WARREN CHASE and
GORDON B. CHASE,

Plaintiffs-Appellants,

vs.

LESTER SCHULTZ and
LEROY SCHULTZ, d/b/a
SCHULTZ BROTHERS,

Defendants-Appellees.

APPEAL FROM THE
CIRCUIT COURT OF
BUREAU COUNTY.

Dove, P. J.

Plaintiffs, Warren Chase and Gordon B. Chase, appeal from a final judgment of the Circuit Court of Bureau County entered on the verdict of the jury in favor of the defendants, Lester Schultz and LeRoy Schultz, doing business as Schultz Brothers.

Count one of the complaint alleged that on September 8, 1950, the plaintiffs purchased from the defendants, at their request, 264 head of feeder pigs at a price of \$19.25 per hundred pounds; that the defendants, for the purpose of inducing the plaintiffs to buy said pigs, falsely and fraudulently represented and stated to the plaintiffs that said pigs were sound and healthy and free from hog cholera or other contagious disease; that the plaintiffs relied upon these representations of the defendants and,

believing them to be true, bought from the defendants said hogs at a total cost of \$6398.70; that the defendants knew at the time of the sale that said hogs were not in sound health and free from hog cholera; that the defendants knew said hogs were sick, unsound and unhealthy and were suffering from and afflicted with hog cholera and had been exposed so as to contact hog cholera or other contagious disease; that 163 head of said feeder pigs which the plaintiffs purchased from the defendants, being so afflicted and diseased, sickened and died, and the money paid for them by the plaintiffs was lost to the plaintiffs in the amount of \$3954.38; that said representations were made by the defendants for the purpose of inducing the plaintiffs to buy said feeder pigs, and that the plaintiffs relied upon the representations made to them by the defendants; that the plaintiffs spent certain sums of money in feeding said pigs and in having them treated by a veterinarian after they became sick. Plaintiffs demanded judgment against the defendants for \$5304.38.

While not specifically pleaded, the plaintiffs claim that their action is based upon the following statutory provision:

"Any owner or person having charge of any swine and having knowledge of, or reasonable grounds to suspect the existence among them of, the disease known as 'hog cholera,' or of any other contagious or infectious disease and who does not use reasonable means to prevent the spread of such disease; or who conveys upon or along any public highway or other public grounds or any private lands, any diseased swine, or swine known to have died of, or been slaughtered on account of, any contagious or infectious disease, shall be liable in damages to the person or persons who may have suffered loss on

account thereof." (Ill. Rev. Stat. 1949, ch. 8, sec. 191.)

The defendants assert that since no breach of the foregoing statute was specifically pleaded, it cannot be relied upon. The complaint, however, alleged facts from which it could be clearly ascertained that the statute was involved. The complaint stated a cause of action and was so treated by the defendants who answered, and the issues made by the complaint and answer were submitted to a jury for determination. There is no merit in this contention.

Only questions of fact are involved in this appeal. It is, therefore, necessary that the substance of the evidence introduced at the trial be reviewed and particularly that evidence which bears upon the question of the knowledge of the defendants as to whether or not they knew that the hogs in question were sick or diseased or had any reason to suspect that they were sick or diseased at and before the time of the sale. There was considerable evidence introduced with reference to whether or not the sale of the hogs was made by the defendants to the plaintiffs or to the Bureau County Livestock and Marketing Association. Although we do not believe that this question is very material, we think that the evidence shows that the sale was made by the defendants to the plaintiffs.

Defendant Lester Schultz, called as an adverse witness under Section 60 of the Civil Practice Act, testified that he and his brother had about 300 to 325 head of hogs for sale on September 8, 1950, the day the hogs were sold; that their hogs were not sick and that they had not lost any hogs. He further testified that there was hog cholera in the neighborhood and that he and his brother had decided to get rid of the hogs as soon as possible rather than to take the risk of their hogs getting the cholera.

The other defendant, LeRoy Schultz, was also called as an adverse witness under Section 60. He testified that plaintiff

Warren Chase and Harold Council, who is the manager of the Bureau County Livestock and Marketing Association, came to his farm about one o'clock on the afternoon of September 8th to look at their pigs and that they went out to look at them. He admitted that someone asked him if there had been sickness on the place but he didn't remember whether it was Chase or Council who asked this question. He stated that his reply was that there was no sickness on the place but that there were sick hogs in the neighborhood. He said he told Council that he and his brother wanted to sell because there was so much sickness close by and that they had a lot of money tied up in feed and were willing to sacrifice a little on the bunch of pigs that they wanted to sell. He further stated that they had about 800 hogs altogether on various places on their farms and that they had no sickness on any of the places where the hogs were located that they wanted to sell but that down in the field, where some of their other hogs were located, they did have some sickness; that the 300 hogs they wanted to sell were all right but that they were afraid that they might get sick, since sickness was all around; that some of the hogs in the group which they wanted to sell were what he considered heavy hogs and that some of them were light. He denied that he knew that the plaintiffs were to take the light hogs and that Council was to buy the heavy ones for the Bureau County Livestock and Marketing Association.

Dr. Joseph L. Albrecht testified that he was a veterinarian with his office located in Princeton, Bureau County, Illinois; that he knew the parties to this suit; that the incubation period for hog cholera is five to six days and that the animals would have to be exposed at least five days before the disease shows;

that he observed the hogs in question on Sunday, September 10th, and noticed that there were a number of noticeably sick pigs, evidenced by such symptoms as staggering, diarrhea, and three or four degrees of fever; that there is no way that a veterinarian can determine merely by looking at a pig whether it has cholera prior to the expiration of the five-day incubation period; that he saw the pigs in question on the Chase farm on September 10th, 11th, and 13th; that he vaccinated 177 of them on the 13th, and that the balance of the 264, which the plaintiffs purchased, were not vaccinated because they were either dead or sick and beyond anything that warranted the additional expense of vaccination; that when he first examined these pigs on September 10th, 95% or better were alive and that he saw five to eight dead ones, and that there was cholera in the vicinity of the Schultz Brothers' farm.

Plaintiff Warren Chase testified that he and his brother are engaged in general farming with emphasis on the feeding of cattle and hogs; that they raise none of the hogs they sell but buy all of them; that Harold Council, the manager of the Bureau County Livestock and Marketing Association, is one of several of their agents who buys hogs for them; that he and Council went to the Schultz farm on September 8, 1950, at about one o'clock, where they met the Schultz brothers and looked at the hogs which were for sale; that he asked one of the Schultz brothers what their reason for selling was and that the reply was that there was sickness around and they didn't want to take a chance on getting it; that he asked Schultz if they had had any sickness and Schultz said that they had not; that Council told Schultz that he couldn't use all of the hogs

that they had for sale; that some of them were too light for his market but that he brought Chase to see if Chase could use the light ones and he would take the heavy ones; that the parties agreed that plaintiffs would take the light pigs and Council the heavy ones, and that the hogs would be delivered to Princeton to be weighed and sorted; that the following day he noticed that three or four pigs that he bought from the defendants were not navigating as they should; that on the next day, Sunday, September 10th, he called Doctor Albrecht, who made an examination of these hogs; that some of the pigs were dying on the next day, Monday; that 164 of the pigs which they purchased from the Schultz Brothers actually died; that they did not have any sickness on their farm at the time they (the plaintiffs) made the purchase of these pigs; that they lost an occasional hog prior to September 8th, but that this was because of the volume which they handled and not from any epidemic; that he asked Schultz if the hogs were sick, and Schultz said none had been sick and that "all that was said of the pigs' health was that they had not been sick and that Schultz wanted to sell because hogs had been sick all around them."

The manager of the Bureau County Livestock and Marketing Association, Harold Council, testified that his duties with this association was that of supervising all of its operations with his main business being that of the buying of hogs; that he and Warren Chase went to the Schultz farm in response to a telephone call on September 8th; that he asked the Schultzes if they had any disease or sickness, and they said no, and that they told him they had about 300 hogs to sell and that he advised that he could use only the

heavy end of those they wanted to sell and that they couldn't make a deal unless the plaintiffs would take the light end; that the reason the Schultzes gave for wanting to sell was that there were a lot of sick hogs in the community and they couldn't afford to take a loss and that they wanted their money rather than to gamble on the sickness; that of the 300 hogs purchased from the Schultzes that day, the Chase brothers took most of them because they were too light for his market; that of those which he took he sustained no loss as a result of sick or dead hogs; that some of the hogs purchased from Schultz brothers were sold in Cudahy, Wisconsin, and some in Chicago, Illinois, and the balance in Philadelphia, Pennsylvania, but that no loss was sustained; that he inspected all of the hogs that were for sale and that he saw no evidence of sickness in the hogs purchased, and that the Schultz brothers told him and Warren Chase that the hogs were healthy and had not been sick and that they had had no death loss.

The defendant Lester Schultz testified on behalf of the defendants that there had been no sickness of any kind affecting hogs on the Schultz farm during the month of August, 1950, and that none of the hogs that were in the same lot as the hogs sold on September 8th had been sick prior to then; that he was never notified by the Chases, or anyone else, after September 8, 1950, that the hogs which were sold on September 8th had become sick; that on September 8th, when Warren Chase asked him why he wanted to sell, he told him there was sickness all around and he didn't want to take a chance; that Oscar Campbell picks up their dead hogs and that they are disposed of in no other way, and that he picked up a few dead hogs on their farm between September 11th and the end of the month. The foregoing is a fair resume of the evidence found in this record.

There is no evidence in this record showing that the defendants, or either of them, had any knowledge that the hogs which they desired to sell were inflicted with hog cholera or other contagious disease, nor any evidence which convinces us that they had reasonable grounds to suspect that their hogs were infected with cholera. The veterinarian testified that there is no way to tell by looking at a hog whether it has hog cholera or not until it has been exposed for five or six days. The hogs in question did not develop cholera until two days after they were delivered, so there was no way for the defendants to know that the hogs were sick at the time of the sale. There is no evidence showing that any of the hogs which remained on the Schultz farm died of cholera. There is affirmative evidence in the record which shows that none of the hogs which Council purchased, on behalf of his association, at the same time that the Chases purchased theirs died.

As we view this suit, a question of fact was presented to the jury to determine. The jury has passed upon the issue presented to it, and the trial court has approved the jury's verdict. While there is some little conflict in the evidence, we do not believe that the verdict of the jury is contrary to the manifest weight of the evidence. The jury and the trial court saw and heard the witnesses and are in a better position than are we to judge their credibility. We would not be justified in disturbing their findings unless we are prepared to say that the conclusion reached is palpably wrong and manifestly against the weight of the evidence. (Wynekoop v. Wynekoop, 407 Ill. 219; Haddad v. Marble, 328 Ill. App. 315; Jorn v. Tallett, 341 Ill. App. 240; Hood Cont. Corp. v. Clark--Randolph Prop., Inc., 347 Ill. 432.)

The judgment of the Circuit Court of Bureau County is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of April, in the year of our Lord one thousand nine hundred and sixty-nine.

John E. Hall
Clerk of the Appellate Court.



3481.A.596

i.

General No. 10630

Agenda No. 10

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

- - - -

October Term, A. D. 1952.

In the Matter of the Petition
of John Smith, et al to De-
tach land from Community
Unit School District No. 426,
and Annex the same to Community
Consolidated School District
No. 183,

Appellees.

vs

Jay Smith, W. C. Hopkins, El-
wood L. Atcheson, Stanley Wood-
ard, Lloyd Banks, George Tin-
gall, and Robert Baker, individ-
ually and as Members of Board
of Education of Community Unit
School District No. 426,

Appellants

Appeal from the
County Court of
DeKalb County.

Dove, F. J.

On August 20, 1951 a petition was filed by appellees, John Smith, Mrs. John Smith and LaVerne Smith in the County Court of DeKalb County seeking to detach certain described territory from Community Unit School District No. 426 and annex it to Community Consolidated School District No. 183, which was an adjoining district. Appellees, who are husband and wife and son, reside upon the land sought to be detached. Upon the hearing on October 15, 1951 an order was entered granting the

prayer of the petition and the described territory was detached from Community Unit School District No. 426 and annexed to Community Consolidated School District No. 123.

An appeal was taken from this order to the Circuit Court of DeKalb County and the transcript of the record of the proceedings had in the County Court was filed as required by the provisions of the School Code in the office of the clerk of the Circuit Court on November 19, 1951. The County Judge certifying that the transcript constituted a true and complete record of all the pleadings and papers filed in the cause and that there was no transcript of testimony for the reason that there was no testimony offered or received either on behalf of the petitioners or the objectors.

On February 25, 1952, appellees filed in the County Court their motion to amend the certificate of the County Judge certifying to the completeness and correctness of the transcript and also their motion to dismiss the appeal. Upon a hearing the County Court granted these motions and on May 5, 1952 entered an order nunc pro tunc as of November 6, 1951 correcting the certificate of the County Court to show that testimony was in fact taken at the original hearing and then ordering that the appeal of appellants to the Circuit Court be dismissed. It is sought, by this appeal, to reverse this order of the County Court entered on May 5, 1952, dismissing the appeal from the County Court to the Circuit Court.

At the time this order of May 5, 1952 was entered the School Code provided that any petitioner or voter who appears at any hearing to oppose the change of boundaries may appeal to the Circuit Court upon filing with the clerk of the County Court a

written notice of appeal within ten days after the final action of the County Judge. The Statute then continues: "When an appeal is so taken to the Circuit Court, the clerk of the County Court shall, within thirty days after the notice of appeal has been filed, transmit to the clerk of the Circuit Court a transcript of the record, including therein a copy of all papers in the case and a transcript of the evidence heard by the County Court, if any, which copy and transcript of evidence shall be furnished to the clerk of the County Court by the appellant. In case of the failure to furnish the copy and transcript within said time, the County Judge shall enter an order dismissing the appeal, and his decision shall be final." (Ill. Rev. St. 1951, Chap. 122, Par. 8-7).

Counsel for appellants insist that the order entered by the County Court on May 5, 1952 amending its certificate of November 6, 1951 and directing the entry of the same as of November 6, 1951 was erroneous and that the court also erred in dismissing their appeal to the Circuit Court. Counsel for appellees call our attention to the fact that the provisions of the School Code applicable to this proceeding were repealed on July 1, 1952 and insist that the appeal of appellants should be dismissed and cite the case of Dolan, et al vs. Whitney Gen. No. 32415 recently decided by our Supreme Court.

In the Dolan case a petition was filed in the County Court of Winnebago County seeking to detach certain territory of former common School Districts from Community Unit School District No. 321 under Section 8-6 of the school Code as it then existed and reestablish those former common school districts. From an order granting the prayer of the petition an appeal was

prosecuted to the Circuit Court which found, by an order entered on April 9 1951, that the petition for detachment conformed to section 8-6 of the School Code as amended in 1949 but that section 8-6 of the School Code had been repealed by implication by an amendment to Section 8-14 of the School Code which was also adopted at the 1949 session of the General Assembly. Leave to appeal from this order of the Circuit Court of April 9 1951 was granted by the Supreme Court and in it's opinion filed on November 20, 1952 the court, after referring to the case of People ex rel. Dolan v. Dasher, 411 Ill. 535 and concluding that it had jurisdiction upon a direct appeal, said: "In 1951 the General Assembly by House Bill No. 1189 (Laws of 1951, p. 1806) expressly repealed sections 8-6, 8-7, 8-14, and fourteen other sections of the School Code. This bill provided that it should take effect on July 1, 1952. Another bill adopted in 1951 (House Bill No. 835, Laws of 1951, p. 1987) enacted a new article 4B of the School Code (Ill. Rev. Stat. 1951, chap. 122, pars. 4B-1 et seq.). This article, which also became effective on July 1, 1952, provides a new method of creating school districts and of changing the boundaries of existing districts. Neither of these bills contained any saving clause as to proceedings which might be pending under sections 8-6 and 8-7 of the School Code. The appellees contend that because of the repeal of those provisions which authorized the institution of the present proceeding, ~~which authorized the institution of the present proceeding,~~ and the substitution of a totally new procedure for the detachment of territory from existing school districts, the proceeding has abated and the cause should be dismissed.

"We were confronted with a similar question in *Board of Education v. Nickell*, 410 Ill. 98. There a county superintendent of schools granted a petition for the detachment of territory from one community unit school district and its annexation to another, under the procedure provided in section 8-6 of the School Code as it existed in 1947. An appeal was taken to the State Superintendent of Public Instruction who affirmed the order of the county superintendent on August 24, 1949. While the appeal was pending before the State Superintendent, however, the provisions of sections 8-6 and 8-7 had been amended, effective July 29, 1949, to take authority over such matters away from the County superintendent and the State Superintendent and to confer it upon the county court and the circuit court. We held that the proceeding to change the school boundaries which was pending upon appeal before the State superintendent abated at once when the amendment establishing a different procedure became effective. Our decision was based upon the settled proposition that the unconditional repeal of a special remedial statute without a savings clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect, it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered. (*People ex rel. Eitel v. Lindheimer*, 371, Ill. 367, 374.) As in the *Nickell* case, no vested right is involved in this action. The Legislature, at its will, may divide, contract or expand the area of a school district and unite it with another district or even abolish it. (*People v. Detherage*, 401, Ill. 25.) Section 4, of the Statutory Construction Act (Ill. Rev. Stat. 1951, chap. 131, par. 4) is therefore inapplicable.

"Appellants urge that this case is distinguishable from the Nickell case, but in our view no difference in principle exists. In the Nickell case, the administrative process had not been completed when the new law became effective; in the present case, the litigation had proceeded to the point where an appeal was pending in this court when the new law became effective. But what is important is that in neither case had the proceedings been concluded when the underlying statute was repealed without any saving clause protecting pending matters. Appellants also argue that the detachment proceeding here involved was 'fully and finally determined' on April 9, 1951, when the circuit court entered its order finding that section 8-6 had been complied with. The present appeal, however, is necessarily from that order of the circuit court. That certain findings in that order would have been final if they had stood alone is not determinative. They did not stand alone, and therefore the order is appealable. (People ex rel. Dolan v. Dasher, 411 Ill. 515.) The conclusion of the circuit court that section 8-6 had been complied with cannot, as appellant urges, be separated from the conclusion of the same court in the same order that section 8-6 had been repealed. We hold, therefore, that the motion to dismiss is well taken and that the cause abated on July 1, 1952 when the statute which authorized this proceeding was repealed."

The only order consistent with the conclusion arrived at by the Supreme Court in the Dolan case, supra, which this court can enter is to dismiss this appeal.

Appeal Dismissed.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and
affix the seal of said Appellate Court, at Ottawa,
this 24th day of April,
in the year of our Lord one thousand nine hundred
and sixty-nine.

John E. Hall
Clerk of the Appellate Court.



348 I.A.596
2.

Gen. No. 10629

Agenda No. 9

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1952

| | | |
|---------------------------------|---|---------------------------|
| ADOLPH DAHLGREN, Einar HOLMERTZ |) | |
| as Administrator of the Estate |) | |
| of Beth Ann Holmertz, deceased, |) | Appeal from Circuit Court |
| and IRENE HOLMERTZ, |) | |
| Plaintiffs-Appellants, |) | Winnebago County, |
| |) | |
| vs. |) | Illinois. |
| |) | |
| RAYMOND HOLTZHEIMER, |) | |
| Defendant-Appellee. |) | |

ANDERSON -- J.

Adolph Dahlgren, Einar Holmertz as administrator of the estate of Beth Ann Holmertz, deceased, and Irene Holmertz, plaintiffs-appellants, filed their suit for wrongful death, personal injuries, and property damages in the Circuit Court of Winnebago County, Illinois, against Raymond Holtzheimer, defendant-appellee. The complaint consisted of three counts which are practically identical except that each count alleges the separate damages sustained by the respective parties.

The complaint in substance states that the defendant turned his automobile across the center line of a State Highway, drove it across the other lane of traffic into the plaintiff's automobile which was off the paved portion of the highway on the shoulder, and caused the injuries complained of. The complaint charges that the defendant negligently operated his automobile, drove it at a high and excessive rate of speed, drove it on the left half of the highway, and failed to keep it under control. Defendant by his answer filed a general denial to the charges in the complaint.

The cause was tried before a jury which returned a verdict against all of the plaintiffs and in favor of the defendant. Appellants' motion for a new trial was denied and the Court entered judgments on the verdicts. Appellants have appealed.

The material facts as disclosed by the abstract are as follows:

Adolph Dahlgren was driving his car north on U. S. Route 51 about two miles south of Rockford, Illinois on January 7, 1951 at about 10:15 P. M. His wife and son were in the front seat with him. Irene Holmertz, her husband, Einar Holmertz, their two children and Patricia Dahlgren were riding in the back seat. The weather was clear and quite cold. Route 51 is a two-lane, concrete pavement and is level and straight where the accident occurred. Raymond Holtzheimer was driving his car south on Route 51. He was accompanied by two friends and was on his way to Mendota, Illinois. Adolph Dahlgren had been driving his car at about forty or forty-five miles per hour. As he approached the point of the accident, he slowed to a speed of thirty or thirty-five miles per hour. He first saw the Holtzheimer car when it was about one-half to three-fourths of a mile away. Holtzheimer was driving south at thirty to thirty-five miles per hour. When the two cars were about 200 or 250 feet apart, the Holtzheimer car started over into the northbound traffic lane toward the Dahlgren car. Dahlgren turned his car to the right off of the pavement into the snow in a ditch. The Holtzheimer car continued skidding and struck the Dahlgren car. The injuries and damages complained of in the complaint resulted.

Defendant's theory of the case is that he was operating his motor vehicle at a reasonable rate of speed; that the highway at the place of the collision was covered with ice; that his skidding across the black line on the wrong side of the icy highway was not caused by any negligence of his, but was an unavoidable accident and hence he was not liable.

The appellants assign as error that the verdict of not guilty was mani-

festly against the weight of the evidence and that the Court erred in giving defendant's instructions fifteen and sixteen. These instructions are as follows:

"15. The Court instructs the jury that, although the statutes of the State of Illinois require the driver of a motor vehicle to drive on the right half of the highway, still the Court instructs the jury that if, because of a slippery condition of the highway, a motor vehicle is on the left half of a highway without negligence or fault on the part of the driver, then, in that event, the Court instructs you that the failure to drive such vehicle on the right half of the highway is excused.

"16. The Court instructs the jury that if you believe from the evidence in this case that at the time of the accident in question, the pavement upon which defendant, Raymond Holtzheimer, was driving was covered with ice and was slippery on account thereof, and if you further believe from the evidence in this case that the automobile driven by the defendant, Raymond Holtzheimer, skidded upon said icy highway, without negligence on the part of the defendant, then, in that event, the Court instructs the jury that the defendant could not be liable under the charges of the complaint that he negligently failed to drive upon the right half of the highway."

Appellants contend that the giving of the above instructions constitutes reversible error.

The testimony as to the condition of the road was in conflict. Several witnesses testified that the roadway at the point of the accident and for several miles in both directions was a sheet of ice, covering the entire road. Dahlgren, one of the plaintiffs, testified that his car did not slide when he turned off the pavement. He further testified that the Holtzheimer car did not slide but came straight at him. It appears therefore that the condition of the roadway was much in dispute, and this was a material question of fact in the lawsuit. This being true, it is especially necessary that the instructions to the jury given on behalf of the successful party should state the law with accuracy and should not contain statements calculated to mislead the jury. (Peters vs. Madigan, 262 Ill. App. 417.)

Appellants cite Susemiehl vs. Red River Lumber Co., 306 Ill. App., 2d Dist., 430, which involved an action for wrongful death arising out of an automobile accident. In that case the facts disclosed that the defendant was driving on the wrong side of the highway. Plaintiff's administrator obtained a verdict and defendant claimed as error that the Court refused to

give an instruction on his behalf. This instruction informed the jury that the skidding of the defendant's car did not of itself constitute negligence but was merely a circumstance to be considered by the jury in determining whether or not the skidding contributed to the accident. The Court said:

"... We think this instruction was properly refused. It singles out certain specific things, namely, the skidding of the defendant's car. It directs a verdict of not guilty. The skidding may have been only an incident to the damage done to the plaintiff's intestate car. We think the language used by Judge Jett in the case of Peters vs. Madigan, 262 Ill. App. 417 aptly applies to this instruction. 'This instruction is bad, because it told the jury what amounted to negligence which was a question for the jury to determine. The instruction clearly invades the province of the jury.... The instruction calls attention to particular facts in the testimony on one side and omits any reference to certain facts shown on the part of the plaintiff.'"

In the Peters case above mentioned the Court held it was reversible error to give an instruction which stated in substance that if the plaintiff saw the defendant's car approaching on the wrong side of the road and did not stop his car but continued driving on his side of the road taking no steps to avoid a collision and failing to exercise the care that a reasonably prudent man would exercise under similar circumstances and an accident occurred, the plaintiff was guilty of contributory negligence as a matter of law and the verdict should be for the defendant. The reasons why this instruction was bad are given in the Susemiehl case above quoted.

It appears to us that instructions fifteen and sixteen are subject to many of the same vices condemned in the above cases. These instructions are also repetitious and are subject to criticism for this reason. Instruction fifteen tells the jury that if the motor vehicle is on the wrong side of the highway because of the slippery condition of the highway without negligence on the part of the driver, then the failure to drive the vehicle on the right side of the highway is excused. As a general proposition this rule of law is correct. (Bradley vs. Madden, 333 Ill. App. 153; Leonard vs. Hey, 269 Mich. 491, 257 N. W. 733; Piggott vs. Newman, 338 Ill. App. 198.) The error of instruction fifteen is that it assumed that the motor vehicle was on the wrong side of the highway because of the condition of the road.

This was an ultimate question of fact for the jury to decide, and therefore invades the province of the jury.

Instruction sixteen does state that if the jury believed from the evidence that certain facts have been established, the plaintiff cannot recover. But again this instruction assumes that the defendant's car skidded without negligence on his part and tells the jury that the defendant could not be liable under the charges of the complaint because he negligently failed to drive on his side of the highway. The giving of this instruction was erroneous and it being peremptory in form and directing a verdict cannot be aided or cured by other instructions but must stand or fall as a proper announcement of the law by its own language. (Hansen vs. Trust Co. of Chicago, 380 Ill. 194.) In effect this instruction tells the jury that if the defendant drove his car on the wrong side of the highway without negligence, the plaintiff cannot recover; that defendant could not be liable if he skidded across the black line without negligence, regardless of whether he was negligent or not in the operation of his automobile after he crossed the black line.

Instruction fifteen was erroneous and instruction sixteen, instead of helping, unduly emphasized the errors of instruction fifteen and did not correctly state the law. The case was close upon the facts, and the jury may well have been misled and confused by the giving of these instructions. We hold that the giving of them constituted reversible error and the plaintiff-appellant is entitled to a new trial.

Appellee filed a motion to dismiss the appeal on account of the alleged insufficiency of the abstract and supplemental abstract. This motion was taken with the case. In our opinion, the abstracts filed herein substantially comply with the rules and are sufficient to present the errors relied on for reversal. The motion to dismiss the appeal is denied.

As this case must be tried again, it is not necessary to pass upon the questions of whether the verdicts are manifestly against the weight of the evidence.

Judgment reversed and cause remanded,

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this.....24th.....day of.....April....., in the year of our Lord one thousand nine hundred and sixty-~~nine~~.....

.....*John E. Hall*.....
Clerk of the Appellate Court.



3481.A.597

Gen. No. 10632

Agenda No. 11.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1952.

| | | |
|-------------------|---|--------------------------|
| ALBINA RIGOTTI, |) | |
| Appellant, |) | |
| vs. |) | Appeal from the |
| |) | Circuit Court of |
| GORDON R. BAILEY, |) | DeKalb County, Illinois. |
| Appellee. |) | |

WOLFE,-- J.

Albina Rigotti was injured in an automobile accident while riding with her husband when it collided with the car of Gordon R. Bailey. She started a suit against Bailey in the Circuit Court of DeKalb County, for the injury she claimed she sustained by reason of the collision.

In her complaint she charges that on the 24th day of September 1949, she was riding as a passenger in the automobile of her husband, Reno Rigotti and proceeding in an easterly direction along and on a gravel road about three miles north of Kirkland in DeKalb County, Illinois; that the road on which she and her husband were riding intersects another road between Kirkland and Belvidere; that while so

riding she was in the exercise of due care and caution for her own safety; that the defendant, George R. Bailey, was driving his automobile in a northern direction upon and along the Kirkland-Belvidere road; that both of the intersecting roads are ordinary country roads and are graveled; that a collision occurred between the two automobiles about 4:30 p.m.; that the plaintiff sustained shock, injuries, lacerations, etc., and was severely injured.

She charges that the defendant was careless and negligent in driving his automobile at a high and excessive rate of speed, failing to keep a lookout either ahead or laterally to discover the automobile in which the plaintiff was riding as a guest, and failed to stop his automobile to avoid the collision; that he failed to give a signal, or warning of his approach and otherwise carelessly operated and managed his automobile and in driving it against the automobile in which the plaintiff was riding as a guest passenger.

The defendant filed his answer in which he admits that the plaintiff's husband, Reno Rigotti, with whom the plaintiff was riding, was driving his automobile in an easterly direction along said road near Kirkland where said road intersects with another road between Kirkland and Belvidere. The answer denies that Albina Rigotti was riding as a guest passenger in the car of her husband and denies that she was exercising due care for her own safety. He denies that he was driving his automobile in a northerly direction on the

Kirkland road, and denies that said roads are graveled. He denies that plaintiff received any injuries on account of his negligence, and denies that he was guilty of any negligence, as alleged in the plaintiff's complaint.

After the case was at issue the defendant, Gordon R. Bailey, asked and was granted leave to file a counterclaim against Reno Rigotti, alleging that it was through his negligence that Gordon R. Bailey received injuries. This was objected to by the plaintiff. Then she asked the Court to try the original suit and the counterclaim separately, but the Court overruled her request and the case proceeded to trial upon the original complaint and answer, and the counterclaim against Reno Rigotti and his answer to the counterclaim. The case was submitted to a jury that found the defendant, Gordon R. Bailey, not guilty in the original suit and Reno Rigotti not guilty on the counterclaim. Appropriate judgments were entered on these verdicts and Albina Rigotti has brought the case here for a review.

It is seriously insisted by the appellant that the verdict of the jury against Albina Rigotti is manifestly against the weight of the evidence. We do not pass upon this question, as from our view of the case there are other errors in the record that show the case should be reversed and remanded for a new trial.

As before stated, over the objection of the plaintiff the defendant, Bailey, was permitted to file a counterclaim

4.

against Reno Rigotti, the husband of the original plaintiff for damage that he sustained in the collision in question. He also overruled the motion of the plaintiff to try the cases separately. In this we think the Court was in error. It is true that the Practice Act is much broader than the old common law rule, but we find no case cited by either plaintiff or defendant that has any bearing particularly on the facts as presented in this appeal. Albina Rigotti cannot be in any way considered a defendant in the counterclaim and any negligence of Reno Rigotti could not be imputed to her. The facts tending to show the negligence of Reno Rigotti would not be proper in the suit of Albina Rigotti against Bailey. It would be hard for the ordinary juror to differentiate between the negligence of Reno Rigotti and the appellant.

Defendant's Instruction No. 16 is as follows: "The Court instructs the jury that if you find from the evidence in this case that the defendant, Gordon R. Bailey, was just before and at the time of the occurrence in question in this case, approaching the intersection in question using due care and caution in driving his automobile, and that the plaintiff, Albina Rigotti, was riding in an automobile driven by her husband, Reno Rigotti, and was, just before and at the time of the occurrence, approaching the same intersection from the left, then you are instructed that the defendant, Gordon R. Bailey, had a right to assume that the driver of the car approaching from the left would use ordinary care and caution

5.

in driving the automobile approaching from the left, and if you find that by and through due and ordinary care the driver of the automobile approaching from the left could have and should have seen that if both automobiles continued their speed and position in approaching the intersection that a collision would necessarily occur, then the driver of the automobile approaching the intersection from the left, under the law, should yield the right of way to the driver of the automobile approaching from the right."

Defendant's Instruction No. 27 is as follows: "Under the complaint of Albina Rigotti against Gordon R. Bailey, the Court instructs the jury that if you find from the preponderance of the evidence, and under the instructions of the Court, that the collision in question was caused solely by the negligence, if any, of Reno Rigotti, Plaintiff's husband, in failing to yield the right of way to the defendant, Gordon R. Bailey, and not through any negligence as charged on the part of the defendant, Gordon R. Bailey, then and in that event, you should find your verdict in favor of the defendant and against the plaintiff." These instructions should not have been given, as they are not applicable in the case of Albina Rigotti against Bailey.

In the case of Curtis vs. Gedman, 338 Ill. App. 463, a second district case, we there held that such instructions were properly refused and we quoted from Chicago City Ry. Co. vs. Lannon, 212 Ill. 477, where it is stated: "The question at issue was not as to the right of way of the street car or

whether or not the driver of the beer wagon was a trespasser liable to punishment for obstructing the car, but whether or not the servants of the appellant negligently, carelessly, wrongfully and improperly operated the car at the time it came in contact with the wagon and caused the injury to the plaintiff. Neither the offered evidence nor the refused instruction was pertinent to that issue. Conceding that appellant had the absolute right of way and that the wagon was wrongfully on the track, those facts could in no way excuse its employees in failing to exercise the highest degree of care consistent with the operation of the car for the safety of passengers riding therein, and if they were negligent in that regard, causing the accident, the company must be held liable, but not otherwise. The evidence was immaterial and the instruction inapplicable to the case." The same doctrine is laid down in the case of *Benson v. Chicago City Ry. Co.*, 208 Ill. App. 613 and *Chicago City R. Co. v. Schaefer*, 121 Ill. App. 334.

We agree with the argument of the appellee that the question of right of way was directly involved in the suit of Bailey against Reno Rigotti the driver of the car in which the plaintiff was riding, and the instructions were properly good as to the cross complaint, but it is wholly misleading as to the appellant in this case.

For the reasons above stated, it is our conclusion that the Court erred and the judgment should be reversed and the cause remanded.

Judgment reversed and remanded.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of April, in the year of our Lord one thousand nine hundred and sixty-nine.

John E. Hall
Clerk of the Appellate Court.



3481. A. 598

1.

Gen. No. 10636

Agenda No. 13.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1952.

REINHOLD HERTZBERG,
Plaintiff-Appellee

vs.

MAE BETZ
Defendant-Appellant

MAE BETZ
Counterclaimant-Appellant

vs.

REINHOLD HERTZBERG,
Counter-Defendant-Appellee.

Appeal from the Circuit
Court of Kankakee
County, Illinois.

WOLFE, -- J.

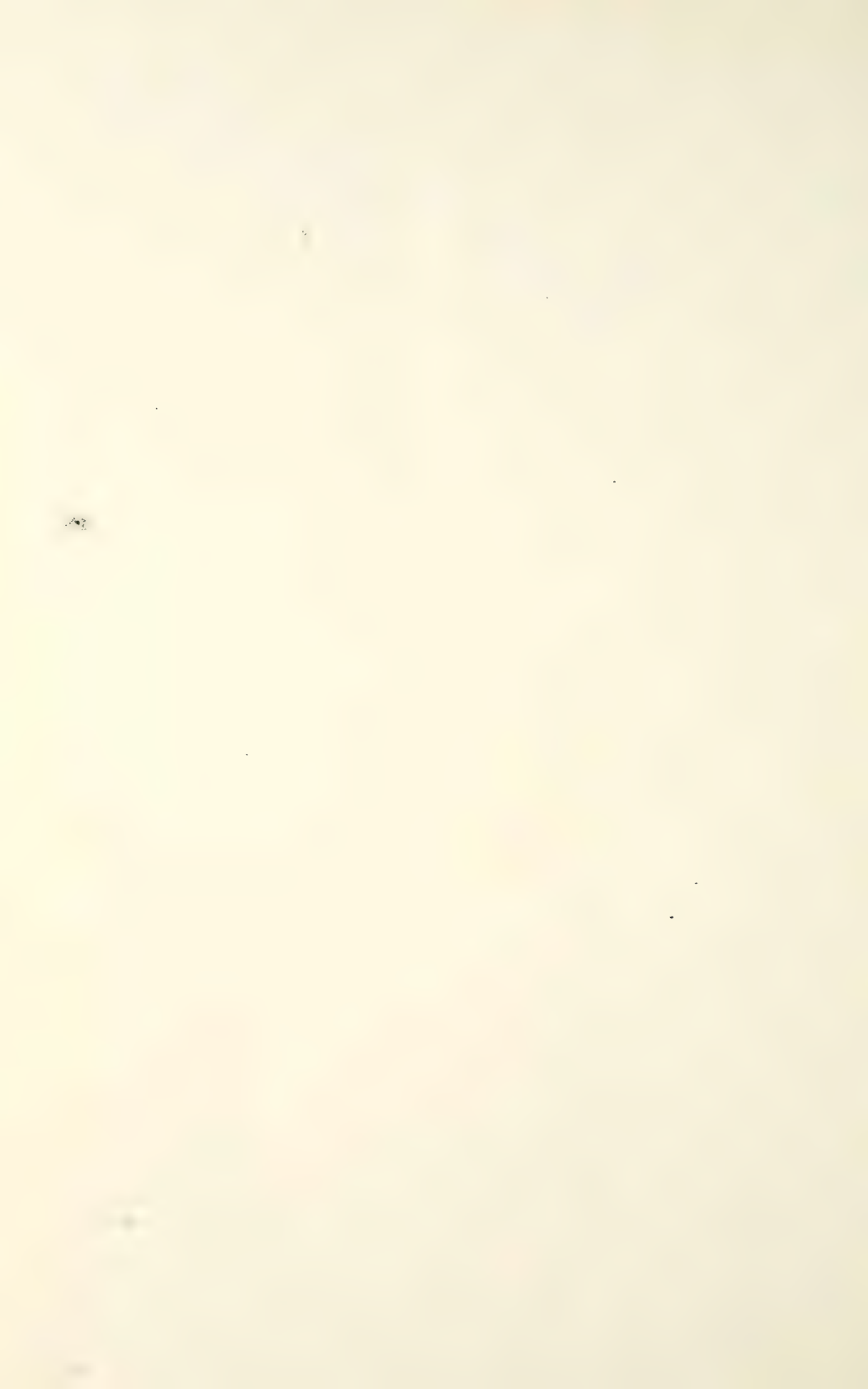
Reinhold Hertzberg filed a suit in the Circuit Court of Kankakee County against Mae Betz to whom he claimed he had loaned \$1,020.00 for which she refused to repay him. Mae Betz filed her answer to the complaint and alleged that she had never borrowed any money from the plaintiff, but that the same was a gift to her. She filed a counterclaim in which she alleged

2.

that Hertzberg was indebted to her for board and room in the amount of \$3,952.00.

The plaintiff and defendant had lived together as man and wife for approximately twenty years. The defendant, Mae Betz, had always rented the premises in which they lived. In April 1948 they had to move from the premises as their landlord had given Mrs. Betz a notice to vacate. She went to look for a house which was for sale and found one. She then took Hertzberg to see it and he advised her to buy the house for the purchase price of \$3,000.00. There is a dispute as to what was said in regard to raising the money. Hertzberg says that he said he would loan Mrs. Betz \$1,020.00 to help make the down payment on the house. Mrs. Betz had \$480.00 in cash and they went to the building and loan and made arrangements to buy the house. It was finally purchased for \$3,000.00 and the deed taken in Mae Betz's name. As before stated, Hertzberg now claims that this advancement was a loan and that Mae Betz promised to repay it. Mae Betz claims it was a gift and she never did promise to repay the money, but always had denied that it was a loan. The evidence shows that plaintiff admits that he had boarded and roomed with the defendant at an agreed price of board and room of \$8.00 per week, but he claims that he had paid for all the board and room that was due Mae Betz.

The evidence shows that Hertzberg was what would commonly be called a handy man, as he did painting, paper hanging, carpenter work and some manual labor around the house, and he claims the work



that he had done more than offset what he might owe for board and room. He admits however, that he has never paid for any board or room since they moved into the new house in April 1948, up until the time he left in June 1950.

The Court heard the evidence without a jury and found the issues in favor of Hertzberg in regard to his claim of \$1,020.00 and that the same was a loan and not a gift. The Court found against the counterclaimant, Mae Betz, in regard to her counterclaim, and rendered judgment in favor of Hertzberg in the sum of \$1,020.00 and dismissed the counterclaim. It was from this judgment that Mae Betz has perfected an appeal to this Court.

It is claimed by the appellant that the Court erred in dismissing her counterclaim, as the evidence clearly shows that Hertzberg had not paid all that was due her for his room and board. The evidence in regard to the counterclaim is conflicting and it is wholly a question of fact that the Court has decided in favor of Mr. Hertzberg. From a review of the evidence, it is our conclusion that the Court properly found that Hertzberg was not indebted to Mae Betz, and that part of the judgment appealed from will be affirmed.

There is no question that Hertzberg furnished \$1,020.00 to Mae Betz, which was used for the down payment of the home in question. As before stated Hertzberg claimed it was a loan and Mrs. Betz claimed it was a gift. In passing upon the evidence it must be borne in mind that this was not the ordinary transaction between strangers, but that at the time of this transaction the

4.

relationship of husband and wife existed while not legally, but in fact. Mae Betz says that she had to move from the home she was occupying in April 1948 on account of Hertzberg's acts toward her landlord. Hertzberg denied this and said he never had any trouble with George Vaillencourt, the owner of the premises in which they had been living. He is directly contradicted by Vaillencourt who says that this was the reason that he had given Mae Betz notice to move and that he had had trouble with Hertzberg on several different occasions, and even had a lawsuit with him.

Before the purchase of the new home was completed, Mae Betz said that they were talking over their difficulty in not having any home to which they could go, and that she told Mr. Hertzberg that she did not have money enough to make a payment on a new house to which Hertzberg replied: "I have it, you can have it. I have no home only with you." She then stated: "I told him I would never be able to pay that amount of money back," and he said, "I didn't ask for it, that is my home." The evidence shows conclusively that he had made his home with Mae Betz in the purchased property and had not paid one cent of board or room since they bought the home. Hertzberg claimed that Mr. Price, the man who sold Mae Betz the home, heard him say that he was loaning the money to Mae Betz. The record discloses that Mr. Price positively states that he never heard any such statement. Hertzberg also claims that Mae Betz agreed to pay the money back from her earnings at Manteno State Hospital,

at which she was employed and was to start payment after her first payday, which was every two weeks. He claims he asked her for a payment and that she refused to make the payment, not because she did not have the money, but said: "I don't owe you anything;" that he had asked her frequently for payments and she had always denied that she owed him anything, or that she had borrowed any money from him. During all this time they were living together as man and wife and apparently peacefully. Mae Betz denies that he had ever asked her for any money until April or May 1950, when he had become engaged to marry and did marry another woman.

Mr. Hertzberg's evidence is not direct and positive on a great many circumstances that surround this transaction and while his direct evidence was positive, his cross-examination was very evasive, not only to the defendant's attorney, but to the Court himself when he refused to answer some questions that the Court told him were pertinent to the issues in the case.

We are aware of the rule of law that a reviewing Court should give much credence to the trial court that has heard the evidence and could see the witnesses, and unless the evidence as we review it, is manifestly against the Court's finding, we would not be justified in coming to a different conclusion than that of the trial Court. However, after a review of the evidence, and we do conclude that the finding of the Court is against the weight of the evidence, it is then our duty to so find. Under the record in this case, it is our conclusion that the Court

6.

was in error in finding that this money which was furnished by Hertzberg for the purchase of this home was a loan, but should have found that it was a gift from Hertzberg to Mae Betz. The judgment appealed from will be affirmed as to the finding on the cross complaint, but will be reversed as to the finding that Mae Betz is indebted to Hertzberg for \$1,020.00.

Affirmed in part and reversed in part.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of April, in the year of our Lord one thousand nine hundred and sixty-nine.

John E. Hall
Clerk of the Appellate Court.



348 I.A.598

2.

Gen. No. 10640

Agenda No. 16.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1952.

| | | |
|--|---|----------------|
| ERLE E. FRENCH, The People of the |) | |
| State of Illinois for the Use of |) | |
| ERLE E. FRENCH, |) | |
| Plaintiffs-Appellants, |) | |
| vs. |) | Appeal from |
| |) | Circuit Court, |
| J. LISLE LAUFER, BYRON R. SCOTT, |) | Kane County, |
| THE TRAVELERS INDEMNITY COMPANY, |) | Illinois. |
| a corporation of Hartford Connecticut, |) | |
| Defendants-Appellees. |) | |

WOLFE,-- J.

Erle E. French brought a suit in the Circuit Court of Kane County, against J. Lisle Laufer, Byron R. Scott and the Travelers Indemnity Company, a corporation of Hartford, Connecticut, for damages that he is alleged to have sustained by being evicted from certain described premises. It is alleged that Laufer unlawfully caused a writ of assistance to be issued out of the Circuit Court of Kane County to Byron R. Scott, the sheriff of Kane County and said writ was executed by the sheriff through his deputy. The Travelers Indemnity Company was the surety on the sheriff's bond.

2.

The original complaint filed consisted of four counts. The first two were directed solely to J. Lisle Laufer. The other two against all of the defendants. The defendants entered a motion to strike the complaint and the Court overruled their motion as to Counts 1 and 2, but sustained them as to Counts 3 and 4. The plaintiffs asked and were granted leave to file an amended Count 3 and 4, which was done. Numerous motions back and forth were filed and several continuances granted.

On April 21, 1952, the plaintiffs presented to the Court the following motion: "Now come the plaintiffs by Simpson and Simpson and J. M. Bartley, their attorneys, and move that final judgment be entered in favor of the defendant J. Lisle Laufer, Byron R. Scott, and The Travelers Indemnity Company, a Corporation of Hartford, Connecticut, and against plaintiffs on plaintiffs' amended Counts III and IV to their complaint herein, and as grounds therefor say: That heretofore on the 18th day of January, 1952, the Court entered an order herein granting the motions of defendants J. Lisle Laufer and Byron R. Scott to dismiss plaintiffs' said amended Counts III and IV. That plaintiffs have elected to abide by their said amended Counts III and IV and do not desire to waive any of their rights under said amended Counts III and IV. That because said order of January 18, 1952, does not adjudge that plaintiffs take nothing by said Counts III and IV and defendants go hence without day, plaintiffs do not consider said order of January 18, 1952, to be a final appealable order. That

3.

plaintiffs desire that a final appealable order be entered herein on plaintiffs' said amended Counts III and IV and judgment entered in favor of defendants on said counts so that an appeal may be taken by plaintiffs to the Appellate Court of the Second District of the State of Illinois. That the defendants have failed to move that judgment be entered in their favor on said dismissed Counts III and IV. '

"Wherefore plaintiffs pray that as to said amended Counts III and IV it be ordered and adjudged by the Court that plaintiffs take nothing and the defendants J. Lisle Laufer, Byron R. Scott, and The Travelers Indemnity Company, a corporation of Hartford, Connecticut have execution for their costs and go hence without day." On the same day the Court denied this motion. It is from this order that the plaintiffs have brought the case to this Court for review.'

Plaintiffs' notice of appeal is in part as follows:

"Please Take Notice that the plaintiffs in the above entitled cause, Erle E. French and The People of the State of Illinois for the Use of Erle E. French, hereby appeal to the Appellate Court for the Second District of the State of Illinois from the order entered in the above matter in the Circuit Court of Kane County, Illinois, on the 21st day of April, 1952, whereby said Circuit Court denied the motion of plaintiffs that judgment be entered in favor of defendants and against plaintiffs on plaintiffs' Amended Counts III and IV to plaintiffs' complaint herein, said counts previously having been dismissed by order of the Circuit Court of Kane County and plaintiffs electing to stand thereon." There can be no question but that the

aforementioned order is the one from which the plaintiffs are attempting to appeal.

The defendants have entered a motion to dismiss the appeal because the order appealed from is not a final appealable judgment. This motion was taken with the case and it is our conclusion that the motion should be sustained and the appeal dismissed, as this order is not a final and appealable judgment. Prange vs. City of Marion, 297 Ill. App. 353; Meyers vs. Ackerlund, 224 Ill. App. 417; American Radiator and Sanitary Corp. vs. Wilhelmi, 308 Ill. App. 316; Board of Education vs. Board of Education, 301 Ill. App. 228; Aetna Plywood Co. vs. Robineau, 336 Ill. App. 339. All of the above cited cases are authority for the proposition that the order in the present case is not a final judgment.

The appellant cites the case of McDavid vs. Fiscar, 342 Ill. App. 673, as holding the order appealed from is a judgment. The principal question raised in that case was different from the one in the present case. We are considering an order in which the Court refused to enter a judgment against the plaintiffs and in favor of the defendants. In the McDavid case the Court did enter a judgment in favor of the defendants. The question then arose whether or not this was a consent order and whether it was appealable. The Court there held that it was not a judgment by consent.

It is our conclusion that the order appealed from is not a final and appealable judgment, and the motion to dismiss the appeal is hereby sustained and the appeal dismissed.

Appeal dismissed.

STATE OF ILLINOIS, }
APPELLATE COURT, } ss.
THIRD DISTRICT, }

I, JOHN E. HALL, Clerk of the Appellate Court, in and for said Third District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appellate Court in the above-entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 24th day of April, in the year of our Lord one thousand nine hundred and sixty-none.

John E. Hall
Clerk of the Appellate Court.

RESERVE BOOK

Illinois App. Unpub. Opinions

Vol. 348

97088

This reserve book is not transferable and must not be taken from the library, except when properly charged out for overnight use.

Borrower who signs this card is responsible for the book in accordance with the posted regulations.

Avoid fines and preserve the rights of others by obeying these rules.

| DATE | NAME | |
|----------|---------------------|---------------------|
| 1/5/70 | S. C. L. T. | 410-31131 |
| 4/28/70 | J. J. Burgess | 236-3914 |
| 8/4/70 | J. A. Brown | 431-2639 |
| | R. J. J. | 31357 |
| 10-5-70 | R. J. J. | 416-2840 |
| 1-5-71 | R. J. J. | 125-6544 |
| 2/17/71 | R. J. J. | 236-3914 |
| 2/13/71 | R. J. J. | 52-65544 |
| 10/25/71 | R. J. J. | 720-1945 |

This Book
Does Not
CIRCULATE

Ill. Appellate Ct. Unpub. Opinions

Vol. 348

97088

JUNE 69

N. MANCHESTER,
INDIANA

